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Supreme Court, U.S.
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In The

Supreme Court of the United States

UNITED AMERICAN INSURANCE COMPANY,

Petitioner,

v.

NATALIE MERRILL,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents the same issue that this Court addressed in *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007): "[W]hether the Constitution's Due Process Clause permits a jury to base [a punitive-damages] award in part upon its desire to *punish* the defendant for harming persons who are not before the court (*e.g.*, victims whom the parties do not represent)." *Id.* at 1060 (emphasis in original).

The specific question presented here is whether this Court should GVR for further consideration in light of *Williams*.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE

The case caption contains the names of all parties to the proceeding in the Mississippi Supreme Court: United American Insurance Company and Natalie Merrill. United's agent, Fannie Triplett, was a defendant and cross-claimant in the trial court, but was "not a party to th[e] appeal." App. 10 n. 1.

United American Insurance Company is a wholly-owned subsidiary of Torchmark Corporation. Two entities own 10% or more of Torchmark's stock: Pzena Investment Management, LLC; and Franklin Resources, Inc., Group (including Templeton Global Advisors Limited).

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OPINIONS BELOW

The September 14, 2004, order of the Jasper County (Mississippi) Circuit Court entering judgment for Natalie Merrill ("Merrill") and against United American Insurance Company ("United") on the jury verdict is not reported. It is reproduced at App. 49a.

The December 17, 2004, order of the Jasper County Circuit Court denying (in relevant part) United's motions for judgment notwithstanding the verdict, for new trial, and for remittitur of the punitive-damages award is not reported. It is reproduced at App. 54a.

The January 5, 2005, order of the Jasper County Circuit Court entering final judgment in favor of Merrill and against United is not reported. It is reproduced at App. 59a.

The September 6, 2007, decision of the Mississippi Supreme Court affirming the circuit court's judgment, including the punitive-damages award, is reported at *United American Insurance Co. v. Merrill*, __ So. 2d __, 2007 WL 2493905 (Miss. Sept. 6, 2007), and is reproduced at App. 1a.

The November 1, 2007, order of the Mississippi Supreme Court denying United's motion for rehearing is not reported. It is reproduced at App. 66a.

STATEMENT OF JURISDICTION

This case arises out United's denial of a claim made on a $5000 life-insurance policy, which resulted in a judgment against United in the amount of

approximately $1.63 million, including $900,000 in punitive damages. The Mississippi Supreme Court entered its decision affirming the trial court's judgment (including the contested punitive-damages award) on September 6, 2007. *See* App. 1a. The Mississippi Supreme Court denied United's timely-filed motion for rehearing on November 1, 2007. *See* App. 66a. This petition is timely because it is filed within 90 days of the order denying rehearing. *See* Sup. Ct. R. 13.3.

This Court has jurisdiction under 28 U.S.C. § 1257(a). It is true, as Merrill has argued, that "United did not contest the amount of punitive damages" in its merits briefs to the Mississippi Supreme Court. Br. of Appellee at 74, *United American Ins. Co. v. Merrill*, 2007 WL 2493905 (Sept. 6, 2007) (No. 2005-CA-00048-SCT). For two reasons, however, that fact does not defeat jurisdiction here.

1. Initially, United's failure to raise the "amount" issue in so many words below is "irrelevant to this Court's jurisdiction" because the Mississippi Supreme Court "actually considered and decided" that issue in its written opinion. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991). Specifically, with respect to the jury's $900,000 punitive-damages award, the Mississippi Court held:

> This award is less than five times the amount of compensatory damages and is less than one-half of one percent of United's net worth. Further, as stated by the trial judge in his opinion, this award is consistent with this Court's holding in *Hollins*, 830 So. 2d at

> 1241-42,[1] and with the holding of the United States Supreme Court in *State Farm v. Campbell*. *Campbell* held, "[C]ourts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. at 426, 123 S. Ct. 1513.

App. 46a.[2] This Court has repeatedly invoked the "'elementary rule that it is irrelevant to inquire ... when a Federal question was raised in a court below when it appears that such question was actually considered and decided.'" *Orr v. Orr*, 440 U.S. 268, 274-75 (1979) (quoting *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134 (1914), and citing *Harlin v. Missouri*, 439 U.S. 459 (1979), *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974), and *Raley v. Ohio*, 360 U.S. 423, 436 (1959)). Where, as here, a state supreme

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[1] *American Income Life Ins. Co. v. Hollins*, 830 So. 2d. 1230, 1241-42 (Miss. 2002). In the cited portion of *Hollins*, the Mississippi Supreme Court addressed, in addition to state-law limits on punitive damages, "the United States Supreme Court's holding" in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). *Hollins*, 830 So. 2d at 1242. Further, "since [the defendant there] ha[d] made a federal constitutional challenge that the punitive damages award is excessive," the *Hollins* court "conduct[ed] a de novo review of the $100,000 punitive damages award" as required by *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, (2001). *Hollins*, 830 So. 2d at 1242.

[2] In its decision denying (in relevant part) United's motion to remit the punitive-damages award, the trial court likewise addressed the amount issue. *See* App. 55a-57a (citing *State Farm*).

court addresses a federal question, "[a]n irrebuttable presumption is created that the federal question was timely and properly raised." R. Stern, E. Gressman, *et al.*, *Supreme Court Practice* § 3.19, at 185 (8th ed. 2002).

2. Moreover, and in any event, the constitutional landscape relevant to the punitive-damages award at issue here fundamentally changed after the bulk of the state-court briefing in this case was completed. Specifically, at the time United filed its principal brief in the Mississippi Supreme Court, this Court had not yet "h[e]ld explicitly that a jury may not punish for the harm caused others." *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1065 (2007). This Court did, however, expressly "so hold" thereafter, in *Williams*. *Id.* United presented its *Williams* argument – the same argument it raises here – to the Mississippi Supreme Court in a timely-filed motion for rehearing. (The motion is attached at App. 67a, and the reply brief filed in support of the motion is attached at App. 89a.) That motion was denied without comment. *See* App. 66a. Because United presented the *Williams* argument at the earliest available opportunity after learning of this Court's decision, this is one of those "situations where raising the federal question for the first time in the petition for rehearing is timely even though the state court says nothing in denying the petition." R. Stern, E. Gressman, *et al.*, *supra*, § 3.18(c), at 182-83.[3]

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[3] For obvious reasons, United's failure to make a specific "*Williams* objection" or to request a "*Williams* instruction" in the trial court is not fatal. United objected to the trial court's decisions to give certain of plaintiffs' punitive-damages instructions, *see, e.g.*, Reporter's Record ("RR") 957-58, 961, 963-64,

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution states, in relevant part: "No State shall ... deprive any person of life, liberty, or property, without due process of law ...." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

Natalie Merrill purchased a $5000 life insurance policy on her husband, Robert, from United's agent, Fannie Triplett ("Triplett"). App. 1a, 12a. Question Six on United's life insurance application inquired whether the applicant had been treated for congestive heart failure. App. 13a. Merrill testified at trial that Robert had disclosed to Triplett that he had undergone bypass surgery in the late 1970s. *Id.* Merrill also testified that Triplett told Robert that any problems that had occurred more than three years before the date of the application were irrelevant. *Id.* In any event, to Question Six, concerning a history of congestive heart failure, Robert responded "no." *Id.* Within a year of purchasing the policy, Robert suffered a fatal heart attack. App. 1a.

967, 968-69, and to refuse certain of United's punitive-damages instructions as tendered, *see, e.g.*, RR 971-72, and, as explained below, objected repeatedly to the plaintiffs' lawyers' efforts to introduce evidence of nonparty injuries into the proceedings, *see infra* at 14-15. In that respect, United did at least as much as – if not more than – Philip Morris itself, whose argument this Court considered and accepted in *Williams* despite the company's failure to "preserve *any* objection to the charges in fact delivered to the jury, to the evidence introduced at trial, or to opposing counsel's argument." *Williams*, 127 S. Ct. at 1068 (Ginsburg, J., dissenting) (emphasis added).

United collected Robert's medical records and determined that at the time Robert purchased the policy, he had been treated for congestive heart failure, contravening his response on the insurance form. App. 15a. That determination was disputed at trial. App. 15a-16a. In any event, on the basis of Robert's misrepresentation concerning his history of congestive heart failure, United denied Merrill's claim and refunded her premiums. App. 2a, 16a-18a. Merrill cashed the refund check. App. 17a.

Merrill filed suit in Mississippi state court against United and Triplett on a number of theories, including breach of contract, fraud, and negligence, and sought compensatory and punitive damages. App. 2a; Clerk's Record ("CR") 12-17. United answered that the life insurance policy was void *ab initio* because of Robert's material misrepresentation concerning Question Six and, further, asserted that Merrill's claim for punitive damages violated the Mississippi and United States Constitutions. App. 3a; CR 48-53. With respect to punitive damages, for instance, United contended that "[t]he procedures pursuant to which punitive damages are awarded" "fail to provide a reasonable limit on the amount of the award against the defendant" and "fail to provide sufficiently specific standards or guidelines under which the trier of fact is permitted to award such damages," thereby violating the due process provisions of the Fourteenth Amendment and the Mississippi Constitution. CR 51. In an amended answer, United amplified its contention concerning punitive damages:

> Any punitive damages award in this case is subject to the standards and limitations

> against the imposing of excessive awards under the Due Process Clause of the Fourteenth Amendment of the United States Constitution, as stated in the United States Supreme Court's opinion in *State Farm Mutual Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (April 7, 2003).

CR 1119; *see also* App. 6a.

The case went to trial on the merits. Over United's objections (Reporter's Record ("RR") 609-10, 612, 614-15), the trial court repeatedly allowed both Merrill and Triplett, as cross-claimant, to introduce evidence concerning alleged harm to nonparties to the litigation. The plaintiffs' lawyers, for instance:

- put on testimony that United allegedly denied 95% of life insurance claims submitted to it (RR 609-10, 614-16);
- told the jury that "this case is not only about Ms. Merrill" but, rather, "about insurance consumers throughout this country" and, indeed, that just "as this company has done to Ms. Merrill, you know, there's other ... insurance consumers out here who would make claims" (RR 932); and
- urged the jury to "send a message" to all "corporations who are so inclined to come into our State and take advantage of our citizens, and take advantage of those who are least able to help themselves (RR 979).

The trial court never instructed the jury to disregard these statements and overruled United's objection to Merrill's proffered jury instructions on punitive

damages. *See* RR 957-58, 961, 963-64, 967, 968-69.[4]

After two short deliberations, the jury awarded Merrill $500,000 in compensatory damages and $900,000 in punitive damages. App. 8a. On United's motion, the trial court remitted a portion of the compensatory-damages award but refused to alter the punitive-damages award. App. 56a-57a. The trial court entered judgment for Merrill in the amount of $200,000 in compensatory damages, $900,000 in punitive damages, and $527,474.69 in attorney's fees and expenses. App. 10a-11a, 60a.

United appealed to the Mississippi Supreme Court and requested a remand for a new trial. United argued that the trial court had erred in (1) concluding that Merrill's act of cashing the check refunding her premiums was not a mutual rescission or accord and satisfaction; (2) denying United the use of certain medical records at trial; (3) making assorted evidentiary and instructional rulings; and (4) submitting the punitive-damages issue to the jury. *See* Br. of Appellant at 21-48, *United American Ins. Co. v. Merrill*, 2007 WL 2493905 (Sept. 6, 2007) (No. 2005-CA-00048-SCT). On February 20, 2007 – after both United and Merrill had filed their principal briefs and only shortly before United filed its reply – this Court issued its decision in *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007), holding that the Fourteenth Amendment's Due Process Clause prohibits a jury from basing a punitive-damages award, even in part, on a desire to punish a defendant for

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[4] For a comprehensive recounting of the nonparty-injury evidence that the jury, the trial court, and the Mississippi Supreme court were urged to consider, see *infra* at 12-17.

alleged injuries to third parties not before the court. Unaware of the decision, neither United nor Merrill brought this Court's decision in *Williams* to the Mississippi Supreme Court's attention.

On September 6, 2007, the Mississippi Supreme Court affirmed the trial court's judgment. App. 48a. With respect to punitive damages, the Court held that the trial court was correct to submit the issue to the jury and that the amount awarded was not unconstitutionally excessive. App. 39a-48a. As to amount – the sole question at issue here – the Court stated as follows:

> This award is less than five times the amount of compensatory damages and is less than one-half of one percent of United's net worth. Further, as stated by the trial judge in his opinion, this award is consistent with this Court's holding in *Hollins*, 830 So. 2d at 1241-42,[5] and with the holding of the United States Supreme Court in *State Farm v. Campbell*. *Campbell* held, "[C]ourts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. at 426, 123 S. Ct. 1513.

App. 46a.

In a motion for rehearing filed on September 20, 2007, United advised the Mississippi Supreme Court

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[5] *American Income Life Ins. Co. v. Hollins*, 830 So. 2d. 1230, 1241-42 (Miss. 2002).

of this Court's decision in *Williams* and urged reconsideration in light of it. App. 67a; *see also* App. 91a (reply brief filed in support of motion for rehearing). The Mississippi Supreme Court denied the motion without opinion. App. 66a.

This petition followed.

REASONS FOR GRANTING THE WRIT

I. *Philip Morris USA v. Williams* Clearly Holds That A Jury May Not Base A Punitive-Damages Award On A Desire To Punish A Defendant For Injuries To Nonparties.

In *Philip Morris USA v. Williams*, this Court addressed the question "whether the Constitution's Due Process Clause permits a jury to base [a punitive-damages] award in part upon its desire to *punish* the defendant for harming persons who are not before the court (*e.g.*, victims whom the parties do not represent)." 127 S. Ct. 1057, 1260 (2007) (emphasis in original). This Court held that "such an award would amount to a taking of 'property' from the defendant without due process." *Id.*

Williams arose out of a tort suit brought in Oregon by a smoker's widow against a cigarette manufacturer. In advocating a large punitive award, the plaintiff's lawyer there

> had told the jury to 'think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been. ... In Oregon, how many people do we see outside, driving home ... smoking cigarettes? ... [C]igarettes ... are going to kill ten [of every

> hundred]. [And] the market share of Marlboros [*i.e.*, Philip Morris] is one-third [*i.e.*, one of every three killed].

127 S. Ct. at 1061 (bracketing in original). This Court vacated the resulting punitive award, accepting Philip Morris' contention "that Oregon had unconstitutionally permitted it to be punished for harming nonparty victims." *Id.* at 1062. More particularly, the Court held that the Due Process Clause "forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." *Id.* at 1063.

This Court offered three reasons for so holding. First, it said, "a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing" that facts specific to the nonparty victim's circumstances disentitle him to relief – for instance, that he suffered no harm, that any injury he endured was not in fact caused by the defendant's conduct, or that he was partially responsible for his own loss. *Id.* Second, this Court emphasized that allowing punishment for harm to nonparties "would add a near standardless dimension to the punitive damages equation." *Id.* "How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate." *Id.* Finally, the Court observed, there is simply "no authority" in any relevant precedent – from *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), to *BMW of*

North America, Inc. v. Gore, 517 U.S. 559 (1996), to *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003) – "supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others." *Williams*, 127 S. Ct. at 1063.

This Court acknowledged that "a plaintiff may show harm to others in order to demonstrate [the] reprehensibility" criterion of the punitive-damages calculus. *Id.* at 1063-64. But, the Court stressed, "a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." *Id.* at 1064. In order to navigate the straits between permissible and impermissible uses of nonparty-injury evidence, this Court held that "the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers." *Id.* Specifically, this Court concluded, "where the risk of [jury] misunderstanding is a significant one – because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury – a court, upon request, must protect against that risk." *Id.* at 1065.

II. The Record In This Case Establishes That The Jury's $900,000 Punitive-Damages Award Was Based, At Least In Part, On A Desire To Punish United For Injuries To Nonparties.

In *Williams*, the plaintiff's counsel urged the judge and jury to consider "how many other Jesse Williams[es] in the last 40 years in the State of Ore-

gon there have been." 127 S. Ct. at 1061. Likewise, the record in this case is replete with instances of Merrill's lawyers exhorting the jury, the trial court, and even the Mississippi Supreme Court to rely on injuries to nonparties in fixing the punitive-damages award. Therefore, under *Williams*, the $900,000 award that those exhortations produced is unconstitutionally excessive.

Merrill's lawyers appealed to nonparty injuries from the very outset. Paragraph 11 of the Complaint, for instance, alleges that "United and its agents ... engaged in a scheme to induce the Plaintiff *and others similarly situated* to purchase life insurance policies based upon false or misleading sales presentations ...." CR 10 (emphasis added). The Complaint repeats the "others similarly situated" language – which, while at home in a class action, serves no purpose in an individual action other than to prejudice the fact-finders and damage-calculators – in Paragraph 12, and then again in Paragraph 26 in the lead-up to the punitive-damages allegation itself. *See* CR 10-11, 16. In the same way, the Complaint adverts to nonparty victims when it accuses United of "mak[ing] arbitrary decisions to deny coverage to rightful *beneficiaries* under its policies of insurance without conducting a reasonable investigation." CR 11 (emphasis added).

During the trial itself, the lawyers for both Merrill and United's agent Fannie Triplett sought to adduce testimony that they could use to suggest – inaccurately – that United denies 90-95% of claims filed by people in Merrill's situation. *See* RR 609-10,

614-16.[6] The plaintiffs' lawyers referred to the 90-95% figure during cross-examination of United's corporate representative. *See* RR 792, 810-11. United's trial counsel objected repeatedly that evidence of "other claims" "couldn't possibly be relevant" to any issue in the case, but those objections were overruled and the evidence was allowed. RR 609-10, 612, 614-15. Merrill's and Triplett's attorneys invoked the 90-95% figure – which, by definition, refers to nonparties to the litigation – time and again throughout the trial proceedings. *See, e.g.*, RR 139 (opening statement); RR 167 (voir dire); RR 934 (closing argument).[7]

During his closing argument to the jury, Merrill's lawyer again expressly – and provocatively – appealed to nonparty injuries:

> [W]e told you this was an important case, a big important case, *because this case is not only about Ms. Merrill. It's about insurance consumers throughout this country* and how insurance companies are to treat and live up to the contracts they make with their people.

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[6] In fact, United processes, on average, about 8000 life insurance claims per year. Of those 8000 claims, approximately 15% are considered "contestable" under the terms of the insurance contract, and of those contestable claims, approximately 17% are denied. Accordingly, among the entire universe of claims that United processes each year, only a small fraction are actually denied – about 2.5%. *See* RR 758-61.

[7] Merrill's lawyers also repeatedly adverted to the 90-95% figure in motions filed with the trial court and during on-the-record discussions with the trial judge. *See* CR 1176-77 (motion to compel); RR 29 (hearing on motion to quash subpoena); RR 847 (jury instructions).

> Because, you know, as Jesus said, as you do to me, you do to the least of me. And *as this company has done to Ms. Merrill, you know, there's other insured – other insurance consumers out here who would make claims.*

RR 932 (emphasis added). United's trial counsel promptly objected to this appeal to nonparty injuries, *see id.*, but the trial judge declined to do anything other than to instruct Merrill's lawyer to "[b]e careful." *Id.*

The appeals to nonparty injuries persisted during arguments on punitive damages. One of Merrill's lawyers urged the jury to "send a message, not only to United American but to all other insurance companies and all other corporations who are so inclined *to come into our State and take advantage of our citizens, and take advantage of those who are least able to help themselves.*" RR 979 (emphasis added). Another of Merrill's attorneys reiterated the point he had made earlier and, indeed, further generalized the class of the injured to include all policyholders: "[T]his is a big and important case. It deals with how *insurance consumers* – how *people* be treated when *they* make claims to their insurance companies after *they* have purchased the policies and paid *their* premiums .... And then when *they* make a claim, it's a whole different type of treatment than when you are giving your money." RR 990 (emphasis added). He stressed the point again in concluding his closing: "[I]t is a big and important case to *insurance consumers*. But it's also because this company targets one of our most vulnerable segments of our society, our senior citizens. And not only our senior citizens,

but those that have health problems." RR 992-93 (emphasis added).

So too, in their opposition to United's JNOV/new trial/remittitur motion, Merrill's lawyers pointed, as "evidence supporting the Jury's award of punitive damages," to the allegation that "United denies 95 percent of similar claims" – *i.e.*, claims that, again, may resemble Merrill's in some of their particulars but that, nonetheless, are filed by nonparties to the litigation. CR 2812-13.[8]

Finally – and most pointedly – Merrill's lawyers explicitly defended the $900,000 punitive-damages award in their principal brief to the Mississippi Supreme Court by reference to alleged nonparty injuries. Not only did Merrill's lawyers repeatedly refer in their brief to the allegation that United denies up to 95% of claims submitted by other individuals in Merrill's shoes, *see, e.g.*, Br. of Appellee at 1, 23, 29, 33, 74, 75, *United American Ins. Co. v. Merrill*, 2007 WL 2493905 (Sept. 6, 2007) (No. 2005-CA-00048-SCT), but they also went further and urged (in the "Punitive Damages" portion of their Statement of Facts) that "[t]he evidence demonstrated the impact a punitive damage verdict would have on *punishing United for business in Mississippi*, by showing that Ken Parker, United's General Agent for the State of Mississippi, was number one in the sale of life insurance policies in the nation." *Id.* at 30 (emphasis added and omitted). In the argument section of the brief, the appeal to alleged nonparty injuries was even more patent. Specifically, in contending that "the amount of punitive damages is reasonable,"

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[8] *See supra* note 6.

Merrill's lawyers stressed that "[t]he award is appropriate to *punish United*, which denies up to 95% of similar claims, *for the impact of its gross misconduct in Mississippi* – where it sells more life insurance policies than any other State in the Nation." *Id.* at 74 (emphasis added and omitted).

The repeated appeals to nonparty injuries in this case – and particularly those in the Mississippi Supreme Court, which explicitly advocated "punish[ing]" United for conduct directed to third parties throughout Mississippi – are every bit as stark as the "other Jesse Williams[es]" remark that this Court condemned in *Williams*. *See* 127 S. Ct. at 1061. The appeals here – and the punitive award they serve to support – deserve the same fate.

III. This Court Should GVR For Reconsideration In The Light Of *Williams*.

The record in this case leaves little doubt that the $900,000 punitive-damages award rests, in large part, on allegations of injuries to nonparties. Although the award's inconsistency with *Williams* is sufficiently "obvious" to warrant summary reversal, *see Gonzales v. Thomas*, 126 S. Ct. 1613, 1614 (2006), the unique procedural circumstances here warrant a more "cautious and deferential alternative," *Lawrence v. Chater*, 516 U.S. 163, 168 (1996). Specifically, this Court should grant the petition, vacate the Mississippi Supreme Court's judgment affirming the punitive-damages award, and remand the case for further consideration in light of *Williams*.

A. Under The Criteria Established In This Court's Decisions, GVR Is Appropriate Here.

"[T]he GVR order has, over the past 50 years, become an integral part of this Court's practice ...." *Lawrence*, 516 U.S. at 166. This Court has held that, absent some disqualifying equitable factor, GVR is appropriate

> [1] where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, [2] reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and [3] where it appears that such a redetermination may determine the ultimate outcome of the litigation.

Id. at 167 (enumeration added). As explained below, each of the three conditions established in *Lawrence* is satisfied here, and there is no equitable basis for refusing to GVR.

1. There Is Reason To Believe That The Mississippi Supreme Court Did Not Fully Consider This Court's Recent Decision In *Williams*.

This Court's February 20, 2007, decision in *Williams* is not, we readily concede, technically an "intervening development." Although *Williams* post-dated the filing of United's principal brief in the Mississippi Supreme Court, it pre-dated the filing of United's reply brief (though only by weeks) and that court's decision. The relevant timeline is:

Sept. 29, 2006:	United files its opening brief in the Mississippi Supreme Court.
Jan. 25, 2007:	Merrill files her answering brief in the Mississippi Supreme Court.
Feb. 20, 2007:	This Court issues its decision in *Williams*.
Mar. 14, 2007:	United files its reply brief in the Mississippi Supreme Court without mentioning *Williams*.
Sept. 6, 2007:	The Mississippi Supreme Court issues its decision without mentioning *Williams*.
Sept. 20, 2007:	Relying on *Williams*, United moves for rehearing in the Mississippi Supreme Court.
Nov. 1, 2007:	The Mississippi Supreme Court denies rehearing without comment.

Although it is surely true that most GVR orders remand in light of some strictly "intervening development," this Court has correctly recognized that a sensible and equitable GVR practice must extend beyond those post-judgment events to include, as well, "recent," pre-judgment developments "that we have reason to believe the court below did not fully consider." *Lawrence*, 516 U.S. at 167. Indeed, in actual practice, this Court has not hesitated to GVR in the light of its own new – yet not technically intervening – decisions.

In *Lawrence*, for instance, this Court pointed to its earlier order in *Robinson v. Story*, 469 U.S. 1081 (1984), in which "we GVR'd for further consideration in light of a Supreme Court decision rendered almost three months *before* the summary affirmance by the Court of Appeals that was the subject of the petition for certiorari." 516 U.S. at 169 (emphasis in original). So, too, in *Stutson v. United States*, issued the same day as *Lawrence*, this Court GVR'd for reconsideration in light of a decision, *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993), that had been issued almost a year and half before the court of appeals announced the judgment under review and that, in fact, had been specifically argued in the parties' briefs to the court of appeals. *See* 516 U.S. 193, 194 (1996); *see also id.* at 184 (Scalia, J., dissenting). More recently, in *Youngblood v. West Virginia*, this Court GVR'd a matter to a state supreme court for reconsideration in light several decisions in the *Brady* line of cases, the most recent of which, *Kyles v. Whitley*, 514 U.S. 419 (1995), was decided a full decade before the state supreme court ruled. *See* 126 S. Ct. 2188, 2189-90 (2006). *See also Wecht v. Inmates of Allegheny County Jail*, 493 U.S. 948 (1989) (GVR'ing in light of *University of Texas v. Camenisch*, 451 U.S. 390 (1981), decided eight years before lower court's judgment).[9]

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[9] Examples abound of this Court GVR'ing in light of recent, yet preexisting, decisions. *See, e.g., Ravelo v. United States*, 532 U.S. 955 (2001) (GVR in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), decided approximately 1 month before lower court's decision); *Ford v. United States*, 532 U.S. 968 (2001) (same); *Valensia v. United States*, 532 U.S. 901 (2001) (same, even where lower court had expressly mentioned *Apprendi* in

Purely as a matter of timing, therefore, a GVR here would fit comfortably within this Court's traditional and historic GVR practice. In any event, this Court's decisions make clear that timelines are not dispositive. The controlling question when dealing with a "recent," as opposed to technically "intervening," development is whether there is "reason to believe the court below did not fully consider" that development. *Lawrence*, 516 U.S. at 167. Here, there is every reason to believe that the Mississippi Supreme Court did not fully consider the impact of *Williams*.

Neither United in its principal brief to the Mississippi Supreme Court, nor Merrill in hers, addressed *Williams* for an obvious reason: the decision did not yet exist. After *Williams* was decided, neither party mentioned the case until rehearing. (For their part, United's state-court counsel were, as they reported to the Mississippi Supreme Court in their motion for rehearing, "simply unaware of the decision." App. 73a.) Nor is there any indication – in its

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its decision); *Schweninger v. Minnesota*, 525 U.S. 802 (1998) (GVR in light *of Kansas v. Hendricks*, 521 U.S. 346 (1997), decided 3¼ months before lower court's decision); *Coleman v. Minnesota*, 524 U.S. 924 (1998) (same, decided 3 months before lower court's decision); *Lords Landing Village Condo. Council of Unit Owners v. Continental Ins. Co.*, 520 U.S. 893 (1997) (GVR in light of state court decision issued 11 days before lower court's decision); *Hodgkiss v. United States*, 522 U.S. 1012 (1997) (GVR in light of *Bailey v. United States*, 516 U.S. 137 (1995)); *Parker Solvents v. Royal Ins. Cos. of Am.*, 502 U.S. 801 (1991) (GVR in light of *Salve Regina College v. Russell*, 499 U.S. 225 (1991), decided a few days before lower court's decision); *Connecticut v. Geisler*, 498 U.S. 1019 (1991) (GVR in light of *New York v. Harris*, 495 U.S. 14 (1990), decided three weeks before lower court's opinion).

written opinion or elsewhere – that the Mississippi Supreme Court considered *Williams* in addressing the punitive-damages issues in the case. As explained above (*see supra* at 2-3), the Mississippi Supreme Court addressed in its opinion the question whether the jury's $900,000 punitive-damages award violated federal constitutional limits. But in so doing, it limited its analysis to the familiar "ratio" issue (observing that the punitive award "is less than five times the amount of compensatory damages" and citing *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), for support). App. 46a. The court said nothing – intimated nothing – about the introduction of nonparty-injury evidence or the effect of *Williams*. The silence on all fronts shows that *Williams* simply wasn't considered. And, indeed, the Mississippi Supreme Court's silence persisted even when, having learned of the decision, United expressly invoked *Williams* in a motion for rehearing. The state court simply and summarily denied that motion without comment: "Motion for rehearing filed by appellant is denied." App. 66a.

Procedurally, this case resembles *Lords Landing Village Condominium Council of Unit Owners v. Continental Insurance Co.*, 520 U.S. 893 (1997). *Lords Landing* also involved a "recent" case that predated the decision that was the subject of the certiorari petition. *See id.* at 895. There, as here, "the parties were not aware of the decision until" after the lower court had issued its opinion "and therefore had not brought the case to the [lower court's] attention." *Id.* Shortly after the losing party "learned of" the recent case, it filed a motion (there to recall the mandate, here for rehearing) bringing it to the lower court's attention. *Id.* And there, as here, in response

to the post-judgment motion, the lower court issued a brief, ambiguous order. *See id.* at 895-96.

To be sure, the timelines in the two cases are not identical. But time and again this Court has rejected reliance on rigid timelines in determining the appropriateness of a GVR. The controlling criterion, instead, is whether there is "reason to believe the court below did not fully consider" the new decision. *Lawrence*, 516 U.S. at 167. And on that score, the case for GVR here is actually significantly stronger than it was in *Lords Landing*. There, the losing party's citation of the new decision in its motion to recall the mandate resulted in an order stating that "the said petition and motions are without merit." 520 U.S. at 895. Dissenting from the GVR, Chief Justice Rehnquist stated his belief that the lower court's "without merit" order demonstrated that the court had actually considered whether the new decision "should have required a different disposition of th[at] case than the [original] disposition" and "resolved that question" in the negative. *Id.* at 898 (Rehnquist, C.J., dissenting). A majority of this Court, however, found that "without merit" language does "not establish that [the lower court] actually considered and rejected petitioner's ... argument" based on the new decision. *Id.* at 896-97. Whatever one's view of *Lords Landing*, GVR here should follow from that case *a fortiori*. There is nothing in the Mississippi Supreme Court's one-line order denying rehearing – "Motion for rehearing filed by appellant is denied" (App. 66a) – that remotely suggests (as the "without merit" language arguably did in *Lords Landing*) that that court "actually considered and rejected" United's *Williams* argument. 520 U.S. at 897.

2. There Is A Reasonable Probability That The Mississippi Supreme Court's Decision Rests Upon An Erroneous Premise.

The second question relevant to the GVR calculus is whether, in light of the new decision, there is a "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration," *Lawrence*, 516 U.S. at 167 – or, put more simply, whether "there is reason to question the correctness of the [lower court's] decision," *Lords Landing*, 520 U.S. at 896. The answer here, for all of the reasons identified above, is clearly yes.

This Court stated plainly in *Williams* that the Fourteenth Amendment's Due Process Clause "forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." 127 S. Ct. at 1063. As has already been demonstrated, the record in this case is chock full of examples of Merrill's lawyers appealing to nonparty injuries. *See supra* at 12-17. Given the *Williams* error that infects the punitive-damages verdict here, there is, at the very least, a "reasonable probability" that the Mississippi Supreme Court would, if encouraged to reconsider its decision, reject or remit the award.

3. Reconsideration Of The Punitive Damages Award In Light Of *Williams* Issue Will Directly Affect The Ultimate Outcome Of The Litigation.

The third GVR criterion is satisfied here, as well. The validity of the jury's punitive-damages award is not a matter of mere theoretical interest; it goes directly to the bottom line. Accordingly, reconsideration of the award in light of this Court's recent (and as yet unconsidered) decision in *Williams* will substantially affect "the ultimate outcome of the litigation" within the meaning of *Lawrence*, 516 U.S. at 167. If, on remand, the Mississippi Supreme Court were to conclude that *Williams* error exists – *i.e.*, that the jury's $900,000 award is impermissibly based, at least in part, on a desire to punish United for harm allegedly caused to nonparties – it would have to remedy that error (1) by ordering a new trial of punitive damages or (2) by remitting the punitive-damages award. *See Williams*, 127 S. Ct. at 1065 (noting alternative remedial options). In either event, reconsideration in light of *Williams* would alter the extent of United's liability to Merrill and thus determine the litigation's "ultimate outcome."

B. The Equities Of This Case, As Well As The Policies Underlying GVR Practice, Favor GVR Here.

In *Lawrence*, this Court cautioned that even where there is reason to believe that the lower court failed to consider the new development and that reconsideration in light of the new development could lead to a different result, GVR might still be refused on equitable grounds – where, for instance, (1) the requesting party has engaged in "unfair or manipu-

lative litigation" tactics or (2) the "delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court." 516 U.S. at 168. There is no equitable basis for refusing GVR here.

There could be no suggestion that United's state-court lawyers were attempting to "manipulat[e]" the system by raising *Williams* when they did. As counsel explained in their rehearing papers to the Mississippi Supreme Court, they were simply unaware of the recent *Williams* decision until after that court rendered judgment. App. 73a; *accord* App. 94a ("[T]here is a simple (and honest) response: Counsel just didn't know about *Williams* until after opportunities to raise it had passed."). More importantly, there is absolutely no reason to doubt counsel's explanation, because United had no incentive whatsoever to "hold back" on what appears, for all intents and purposes, to be a winning argument. From a strategic standpoint, it behooved United to get the *Williams* issue in front of the Mississippi courts as soon as possible – which is just what counsel did via a promptly filed rehearing motion.

A cost-benefit analysis does not counsel against GVR. The costs entailed by a remand for reconsideration in light of *Williams* would be minimal. The record in this case is closed. It is what it is. The Mississippi Supreme Court is intimately familiar with the record. It cannot unduly burden that court to review the record and determine, in the first instance, whether the jury's punitive-damages verdict is based on a desire to punish United for harm to nonparties and is thus infected with *Williams* error. The benefit of a GVR is both clear and significant –

namely, ensuring that United is not subjected to a punitive-damages award that, under what we now know to be controlling constitutional law, violates its due process rights.

Not only is there no equitable bar to GVR here, but the policies underlying GVR practice uniformly weigh in favor of that disposition. In *Lawrence*, this Court highlighted four such policies. *See* 516 U.S. at 167. All are present and counsel GVR here. We will consider them briefly in turn.

First, this Court emphasized that a GVR order "assists the court below by flagging a particular issue that it does not appear to have fully considered." *Id.* For reasons already explained, the Mississippi Supreme Court "does not appear to have fully considered" whether and how this Court's recent decision in *Williams* affects the jury's $900,000 punitive-damages award; by GVR'ing, this Court would "flag" the *Williams* issue and encourage the state court to address it. Second, the *Lawrence* Court observed that a GVR order "conserves the scarce resources of this Court that might otherwise be expended on plenary consideration." *Lawrence*, 516 U.S. at 167. There would be little to gain from "plenary consideration" of this case at this stage; the controlling constitutional principle – that a jury may not base any part of a punitive award on a desire to punish a defendant for harm allegedly caused to nonparties – was already established, squarely, in *Williams*. Third, this Court said that a GVR order "assists [it] by procuring the benefit of the lower court's insight before we rule on the merits." *Id.* Although it seems clear to us that the record here reveals *Williams* error, final resolution of that issue would "benefit"

from the "insight" that the Mississippi Supreme Court – the court most familiar with the evidence – could bring to bear.

Finally, this Court in *Lawrence* stressed that a GVR order "alleviates the '[p]otential for unequal treatment' that is inherent in [this Court's] inability to grant plenary review of all pending cases raising similar issues." *Id.* (quoting *United States v. Johnson*, 457 U.S. 537, 555 n.16 (1982)). This consideration strongly supports GVR here. This case, as we have said, presents precisely the same legal question this Court confronted in *Williams* (*see supra* at 10-12), and it involves a factual predicate comparable to the one in *Williams* (*see supra* at 12-17). Moreover, this case is materially similar – in terms of both the legal question presented and the factual context in which that question arises – to both of the cases that this Court has already GVR'd in light of *Williams*: *Exxon Mobil Corp. v. Grefer*, 127 S. Ct. 1371 (2007), and *Ford Motor Co. v. Buell-Wilson*, 127 S. Ct. 2250 (2007). The petitioners in those cases pointed out that the plaintiffs' lawyers had impermissibly encouraged jurors to punish on the basis of nonparty injuries in opening and closing arguments, in witness examinations, and in written submissions. *See* Petition for Writ of Certiorari at 3-5, *Grefer*, 127 S. Ct. 1371 (No. 05-1670); Petition for Writ of Certiorari at 6, 28-29, *Buell-Wilson*, 127 S. Ct. 2250 (No. 06-1068). So too, Merrill's lawyers emphasized third-party injuries in their pleadings, witness examinations, jury arguments, and post-judgment and appellate briefs. *See supra* at 12-17.

The only thing that separates this case from *Grefer* and *Buell-Wilson* – and from *Williams* itself – is

the fortuity of time. Because *Williams* made it to the Court first, Philip Morris enjoyed the benefit of the constitutional rule announced there. And because the petitions in *Grefer* and *Buell-Wilson* were filed before *Williams* was finally decided, ExxonMobil and Ford got the benefit of the rule recognized there, too. *Williams* preceded the Mississippi Supreme Court's decision by several months. But as this Court has repeatedly reiterated – in word and deed – formal timing does not control. The inquiry, instead, is a real-world, functional one: Is there reason to believe that the lower court did not "fully consider" the new precedent? *Lawrence*, 516 U.S. at 167. The answer to this functional question here is a resounding yes – and in *that* critical respect, United is identically situated to those defendants whose cases have been remanded for reconsideration. Absent a GVR here, the "unequal treatment" that this Court lamented in *Lawrence* will be not just a "potential[ity]," but a certainty. *Id.*

* * *

The GVR is the quintessential "substance over form" disposition. It does "not amount to a final determination on the merits," and it conclusively adjudicates no one's rights. *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964). Its sole office is to ensure that every litigant receives "full and fair consideration of his rights in light of all pertinent considerations," *Stutson*, 516 U.S. at 197, and that lower court decisions – the great majority of which will never be reviewed on the merits in this Court – accord with the law.

It is clear, at the very least, that in light of *Williams* there is "reason to question," *Lords Landing*,

520 U.S. at 896, whether the $900,000 punitive-damages award in this case violates the Due Process Clause. Only "'dry formalism,'" *Stutson*, 516 U.S. at 197, could prevent a GVR to the Mississippi Supreme Court for a determination of that question in light of governing precedent.

CONCLUSION

This Court should grant the writ of certiorari, vacate the Mississippi Supreme Court's judgment, and remand the case to that court for further consideration in light of *Williams*.

Respectfully submitted,

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December 12, 2007

Supreme Court of Mississippi.
UNITED AMERICAN INSURANCE COMPANY
v.
Natalie MERRILL.
No. 2005-CA-00048-SCT.

Sept. 6, 2007.

Before WALLER, P.J., DICKINSON and RANDOLPH, JJ.

RANDOLPH, Justice, for the Court.

¶ 1. This appeal is brought by United American Insurance Company ("United") after the beneficiary of one its life insurance policies, Natalie Merrill ("Natalie"), filed suit against it and its agent, resulting in a jury verdict against United.

¶ 2. On September 11, 1996, Natalie and her husband, Robert Merrill ("Robert"), residents of Gautier, purchased a United life insurance policy through an agent, Fannie Triplett ("Triplett"). The policy guaranteed the designated beneficiary, in this instance Natalie, $5,000 upon the insured's death, in this instance Robert. When Natalie did not receive the promised benefits of this policy, she was forced to take out a loan to pay for Robert's funeral. In order to satisfy the loan obligation, Natalie, at age 71, was required to take a job at the Boomtown Casino working the graveyard shift.

¶ 3. All premiums for the life insurance were timely paid. On May 20, 1997, Robert suffered a fatal heart attack and died at his home. Natalie followed the

procedures specified by United for processing her claim for the promised benefits. United preliminarily denied Natalie's claim for policy benefits by correspondence first on December 4, 1997, and then again on January 7, 2000, claiming the policy was void *ab initio,* based on alleged material misrepresentations made by Robert during the application process.

¶ 4. Natalie filed suit on July 24, 2000, in the residence county of United's agent, Triplett. The Complaint named as defendants United, Triplett and unknown employees of United. The Complaint averred the defendants engaged in numerous acts of fraud and negligence, including, but not limited to: fraud in the inducement of the purchase of the policy, delay in processing the claim, negligent failure to properly and timely investigate Natalie's claim, negligent training and supervision of United employees, negligent failure to provide a reasonable basis for denying Natalie's claim for benefits in relation to the insurance policy, and finally, conscious, gross and reckless disregard for the rights of Natalie, including attempting to use Natalie's emotional instability and financial dire straits to induce her to accept a return of premiums paid. The Complaint further averred that United and its agents, including Triplett, committed the tort of outrage by engaging in behavior that would shock the conscience of a reasonable person. Additionally, Natalie sought punitive damages as "the misrepresentations, omissions and concealment of material facts were intentional and deliberate and were part of a willful scheme or course of conduct."

¶ 5. United removed the case to federal court claim-

ing fraudulent joinder. Natalie filed a Motion to Remand. The United States District Court for the Southern District of Mississippi, Eastern Division, issued an Memorandum Opinion and Order granting Natalie's Motion to Remand based on United's failure to demonstrate Triplett was fraudulently joined.

¶ 6. United filed its Answer and Defenses alleging that it acted in good faith at all times regarding Natalie's claim and that the life insurance policy was void *ab initio* because of material misrepresentations Robert had made about his health. Further, United alleged Natalie's claim for punitive damages violated the United States and Mississippi Constitutions.

¶ 7. Triplett filed an Answer and Cross-Complaint against United. Triplett averred that at all times, she acted in the course and scope of her employment with United, and "would show that her acts with regard to the sale of the United insurance products were at all times in conformance with the instruction and training she was given by United." Triplett further denied she acted wrongfully or intentionally or with such reckless disregard as to entitle Natalie to punitive damages from her.

¶ 8. In her cross-complaint, Triplett further averred that if she was found to be liable to Natalie, then United would be liable to her, as all of her acts were in accordance with the training and supervision she received from United. Triplett alleged that United, through its supervisory personnel, promoted and encouraged deceptive sales practices in order to increase sales. Triplett additionally pleaded that United fraudulently conceals from its agents mate-

rial facts regarding United's products and its deceptive sales practices. Triplett stated that United "repeatedly enhances its sales figures and reaps enormous sums of profit at the expense of the business and personal reputations of Triplett and other agents so recruited." Triplett claimed she suffered anxiety, worry, mental and emotional distress as a result of her friends, family and community believing she misled them in her sales practices. Triplett claimed she should be indemnified by United, as United had a duty to properly defend Triplett as their agent. She stated the acts committed by United were intentional, willful and grossly negligent and that she was entitled to compensatory and punitive damages, as well as indemnification for her attorney's fees and expenses.

¶ 9. United not only filed a Separate Answer and Defenses to Triplett's cross-complaint, but also filed a counterclaim against Triplett. United claimed it acted in good faith at all times regarding Triplett and additionally, that her claims for punitive damages were in violation of the United States and Mississippi Constitutions. In its counterclaim, United stated that if it was determined by the court that Triplett was an agent for United, then Triplett was liable for breach of fiduciary duty she owed to United. Triplett filed an Answer to United's counterclaim which reiterated the averments from her cross-complaint.

¶ 10. Trial was set for February 11, 2003. Discovery ensued, with United and Natalie each continually and acrimoniously accusing the other of gross discovery violations, which will be discussed *infra*.

¶ 11. On December 5, 2002, United filed a Motion for Withdrawal and Substitution of Counsel. Natalie filed a Response in Opposition to this motion, saying it would cause an unnecessary delay in trial. However, the motion was granted by the trial court.

¶ 12. On December 19, 2002, Natalie filed a Motion for Sanctions, and in the Alternative, Motion to Compel United to fully respond to Natalie's discovery requests. Further, Natalie filed a Motion to Quash or in the Alternative, a Protective Order, as she believed United filed improper medical records subpoenas. In its Response, United argued the terms of the policy did not govern and/or restrict the medical records to which they were entitled, but that Mississippi Rule of Civil Procedure 26(b)(1) did. A hearing took place on these motions and the Motion for Sanctions was granted by the trial court.

¶ 13. United then filed a Motion for Continuance, which claimed discovery was delayed due to the removal to federal court. This Motion was granted by the trial court and trial was reset for May 19, 2003.

¶ 14. Subsequently, the parties agreed to delay trial a third time and chose a trial date of October 13, 2003. On September 2, 2003, United filed a Motion for Leave to Amend its Answer to the Complaint and Cross-Complaint. In its Motion, United pleaded that if allowed to amend its Answer, it would assert new defenses, but that these amendments would not unfairly surprise or prejudice Natalie or Triplett in any way.

¶ 15. United sought leave to amend its Answer to address the United States Supreme Court's decision regarding punitive damages in *State Farm Mutual Auto. Insurance v. Campbell,* 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) and to permit an additional affirmative defenses against Natalie of accord and satisfaction, claiming Natalie cashed a check from United refunding premiums and further, that Natalie was not the real party in interest and lacked standing to bring this claim. An additional defense asserted against Triplett was that due to a scrivener's error, United erred in replying to Triplett's Requests for Admission. Triplett and Natalie responded that the Motion to Amend, which was made forty-five days before trial, was not timely and that they would suffer actual prejudice if United were allowed to amend. However, the trial court granted United's Motion to Amend.

¶ 16. United then filed a Motion for Continuance, claiming its experts were unable to attend trial. A continuance was granted by the trial court and trial was reset for the fourth time for December 29, 2003.

¶ 17. On December 8, 2003, United filed requests to issue eleven subpoenas. The next day, United filed yet another Motion for Continuance due to the unavailability of a witness. On December 11, 2003, the trial court heard the Motion for Continuance. Natalie claimed this Motion for Continuance addressed only the unavailability of the expert and not the need for the information from the eleven subpoenas which had been served. Natalie further claimed that at the time of the hearing, she had not yet received notice of the service of the eleven subpoenas. Continuance

was granted due to the unavailability of the witness, and trial was rescheduled for February 9, 2004, the fifth trial setting. Subsequently, after Natalie discovered the issuance of the eleven subpoenas, on December 23, 2003, Natalie filed a Motion to Quash, or in the Alternative, for a Protective Order.

¶ 18. Due to medical reasons of one of the counsel involved, the trial was again continued. Trial was reset for August 2, 2004, the sixth trial date.

¶ 19. On January 27, 2004, Triplett filed a Motion to Withdraw Certain Claims. Triplett withdrew any allegation contained within her Cross-Complaint that dealt with her standing in her community.

¶ 20. On July 20, 2004, United filed its Response to Natalie's Motion to Quash the documents received from the eleven subpoenas issued on December 8, 2003. Natalie alleged that United made no effort to access the records and information from the subpoenas prior to its Response on July 20, 2004.

¶ 21. On July 23, 2004, the trial court heard argument on Natalie's Motion to Quash and granted it, but allowed United to proffer the records currently in its possession.

¶ 22. On July 26, 2004, Natalie filed motions in limine and motions to strike and exclude expert testimony based on United "trying, for the first time, after years of litigation, to offer opinion testimony from several cardiologists about what they think Robert should have been diagnosed with...." Natalie argued to exclude any evidence of Robert's previous

health or any evidence of medical information of which Robert was unaware. Natalie's motions in limine, motion to strike and motion to exclude were preliminarily denied, but the trial court allowed that these motions could be renewed at the time of the witnesses' testimony, during their testimony and at the conclusion of their testimony.

¶ 23. Trial began on August 2 and ended on August 6, 2004. The trial was bifurcated, and after the jury awarded compensatory damages, a separate hearing was conducted on punitive damages. The verdicts of the jury were as follows:

> 1) For Natalie against United, $500,000 in compensatory damages.
> 2) For Triplett against United, $250,000 in compensatory damages.
> 3) For Natalie against United for United's bad faith breach of contract, $900,000 in punitive damages.
> 4) For Triplett against United, $900,000 in punitive damages.

On August 13, 2004, Natalie filed a Motion to Amend the Pleadings to Conform to the Evidence and for Award of Attorney's Fees. United responded and Natalie subsequently filed a rebuttal to United's Response. The trial judge included his ruling on these motions in the Order of Final Judgment.

¶ 24. While not conceding Natalie was entitled to attorney's fees and expenses, United *stipulated* that the amount of attorney's fees and expenses she submitted was reasonable. The trial court ruled that

Natalie was entitled to attorney's fees and expenses and accepted that the stipulated amount was reasonable.

¶ 25. The trial court entered judgment for Natalie on the jury verdict, plus attorney's fees and expenses and post-judgment interest on the total at 8% per annum. Judgment was entered for Triplett on the jury verdict, plus post-judgment interest, also at 8% per annum on the total.

¶ 26. On September 22, 2004, United filed a Motion for Judgment Notwithstanding the Verdict, or in the Alternative, for New Trial or Remittiturs, to which Natalie and Triplett, individually, filed responses. The trial court denied United's Motion for Judgment Notwithstanding the Verdict, as well as United's Motion for New Trial. However, the trial court granted the Motion for Remittitur for compensatory and punitive damages as to Natalie and Triplett and for punitive damages as to Triplett.

¶ 27. The trial court found Triplett proved her attorney's fees were $75,000. The trial court found that she failed to prove any other damages and reduced her compensatory damages to $75,000. Citing *State Farm v. Campbell,* the trial court calculated that nine times Triplett's compensatory damages was $675,000, and accordingly reduced Triplett's punitive damages award to $675,000.

¶ 28. Citing this Court's decision in *Stewart v. Gulf Guaranty Life Insurance Co.*, 846 So.2d 192 (Miss.2002), the trial court analyzed the compensatory damage award to Natalie and found it excessive

in light of the overwhelming weight of the evidence. The court reduced Natalie's award of compensatory damages to $200,000. The trial court further found: "As much deference as possible should be given to the jury's verdict; since nine times Ms. Merrill's compensatory damages (after the remittitur) exceeds the punitive damage award set by the jury, the punitive damage award to Ms. Merrill will stand as the jury determined."

¶ 29. Natalie accepted the remittitur pursuant to Miss.Code Ann. Sect. 11-1-55 (Rev.2002). Natalie accepted the remittitur for the sole purpose of facilitating a final judgment, but did not waive her right to cross-appeal in the event United appealed the final judgment.

¶ 30. Subsequently, Triplett filed an Affidavit on Judgment Satisfaction, authorizing the clerk of the circuit court to mark the judgment satisfied and canceled "as it pertains to relief granted in favor of cross-claimant Fannie L. Triplett and against cross-defendant, United American Insurance Company...."

¶ 31. On January 5, 2005, the trial court entered a Judgment of Dismissal with Prejudice as it pertained to Triplett's claims. The judgment stated that all of Triplett's claims against United should be dismissed with all parties bearing their own costs.[1]

¶ 32. The trial court entered final judgment in favor of Natalie on January 5, 2005. The final judgment recited that Natalie should recover from United: 1)

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[1] Triplett is not a party to this appeal.

$200,000 in compensatory damages; 2) $900,000 in punitive damages; 3) $527,474.69 in attorney's fees and expenses; and 4) post-judgment interest of 8% per annum on the total judgment. It is from this judgment that United appeals.

¶ 33. United presents the following issues for appeal:

> I. Whether the trial court erred in failing to grant United's Directed Verdict Motion, Peremptory Instruction, and Motion for Judgment Notwithstanding the Verdict.
>
> II. Whether, alternatively, a new trial is in order because the trial court erred in denying the use of medical records of Robert at trial and in denying United's Motions for a Mistrial or Continuance; erred in instructing the jury; and erred in evidentiary rulings.
>
> III. Whether the trial court erred procedurally and substantively in submitting to the jury any extracontractual/punitive damages issues.

¶ 34. Robert Merrill was a veteran who was employed by the Pascagoula Port Authority as a security guard until his death at age 68. Natalie testified Robert was in good health and spirits until his death. Robert decided to obtain insurance for final or burial expenses. Robert informed Natalie that Triplett would visit them at their home to sell them this insurance.

¶ 35. Triplett was an employee of Parker and Associ-

ates. Parker and Associates was an affiliate of United, and Ken Parker was United's General Agent for the State of Mississippi. Parker and Associates sent out mailings and advertised on television and received calls from the general public. A member of the public would telephone Parker and Associates to inquire about insurance, and then Parker and Associates would send an agent to the inquirer's home. The agent recommended a certain type of insurance, and if the agent made the sale, the agent received his or her commission from Parker and Associates, as well as from the insurance company, which in this case was United. If the agent did not make the sale, they received no compensation. Gene Grimland ("Grimland"), United's President of the General Agency and Marketing Division, testified that Triplett had authority to talk to the Merrills, solicit the sale of United's policy and fill out the application on behalf of United.

¶ 36. Triplett testified she received little or no training to sell insurance. She stated that on her first day, she went out with another agent and observed him, but on the second day, she was on her own. Triplett testified she also attended a workshop at Parker and Associates, which took place nine months after she began working for the company. United told her "to push, push, push to bring money in." Triplett testified that she was concerned that she was allowed to "go out there just foot free and loose."

¶ 37. On September 11, 1996, Triplett visited the Merrills at their home. Natalie testified that Triplett recommended the United policy. United later issued a policy for $5,000 insurance on Robert's life, with

Natalie as the beneficiary. The insurance application consisted of eight health-related questions, which were to be answered simply "yes" or "no." Grimland testified that this type of insurance is a very "liberal application," and "that there are a lot of diseases you can have and still be insured by this," so the "prices are higher than normal life insurance."

¶ 38. Natalie and Triplett both testified that Triplett asked Robert the questions which were printed on the insurance application. Triplett read the questions to Robert and recorded his answers. Triplett further testified no one ever explained to her what these questions meant.

¶ 39. The only writing by Robert on the form was his signature at the bottom of the application. While they were going over the questions on the application, Natalie testified that Robert told Triplett he had had heart bypass surgery in 1978 and 1979 and showed her his scar from these surgeries. Natalie further testified that Robert told Triplett he still went for checkups for his heart. Natalie testified that Triplett told Robert that these problems took place so long ago that they did not matter, and that United inquired back only three years. Therefore, to question six on the application, Robert responded "no."[2] Triplett made no notation on the application that Robert had disclosed past heart problems to her.

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[2] The specific question asked on the application: "Within the past three years, has the proposed insured had or been treated for a heart attack, congestive heart failure, stroke or been advised to have surgery for a heart condition or for any blood vessel disease but not had such surgery."

¶ 40. Triplett testified that she told the Merrills that if Robert were to die, Natalie would be paid the policy benefit thirty days after she sent in the death certificate, because that is what she was told by United. It was Triplett's testimony she was instructed by United to tell potential applicants that "someone always pays." There was a two-year Incontestability Clause contained within the policy which was later issued, in which United reserved the right to deny claims on certain bases if the insured died within two years. Triplett testified she was not told by United about an Incontestability Clause, nor did she relay any information about it to the Merrills.

¶ 41. Based on the answers Robert provided her, Triplett marked "no" to each of the medical questions contained on the application. A representative for United, employed by its parent, Globe Life Insurance, Sandra Whitaker ("Whitaker"), testified that if all questions on the application were answered "no," then United made no further request for additional medical records or information at the time of application, and that United conducted no underwriting before accepting an application. Whitaker stated, "We rely on the responses provided on the application."

¶ 42. United's marketing materials for its policy stated, "Your Protection Can *Never* Be Cancelled As Long As Premiums Are Paid On Time."(Emphasis contained in original). The Merrills timely paid each of their premiums. The premiums were $50 a month and Robert authorized an automatic bank draft. However, in a discovery deposition it was determined that United was drafting $54 a month rather than

$50. $54 is the amount one would pay if they were billed directly by mail. United claimed it was a mistake and that all premiums were refunded in full.

¶ 43. On May 30, 1997, United received notice of Robert's death in the form of a copy of the death certificate, stating the cause of death to be a myocardial infarction due to hypertension, a consequence of a history of bypass surgery. For more than eight months, from May 30, 1997, until March 2, 1998, United collected Robert's medical records. In the interim, on September 22, 1997, United wrote a letter to Natalie stating it needed additional time to review Robert's medical records before it could process her claim.

¶ 44. By letter, Natalie authorized United to obtain Robert's medical records for the preceding *five* years. However, United sought and obtained records only from September of 1993 until September of 1996, the three years preceding the application. United specifically inquired of Robert's treating physicians if he had ever been treated for congestive heart failure and each of these physicians answered "no."

¶ 45. Notwithstanding the response of Robert's physicians, United's underwriting department (none of whom have any medical training), its medical director and a cardiologist, hired by United for trial who never treated Robert, concluded that Robert's death was the result of congestive heart failure. The medical director for United, Dr. Stanley McCampbell ("Dr. McCampbell"), opined the medical records *indicated* Robert had congestive heart failure. (Emphasis added). Dr. McCampbell conceded on cross-

examination that none of the records from Robert's treating physicians included the words or contained a diagnosis of "congestive heart failure." He also testified that had *he* been treating a patient with congestive heart failure, he would have written "congestive heart failure" in his medical record. Dr. McCampbell, as well as Dr. Malcom Taylor, an expert separately retained by United for trial, testified Robert's records revealed he had been taking Lasix and Lanoxin, which in Dr. Taylor's words, are the "classic drug regimen" for congestive heart failure. Dr. Eva Magiros, Robert's cardiologist, and Dr. Robert Holbert, Robert's treating physician, whose records United obtained, disputed the opinions offered by the experts hired by United. Both treating physicians testified they were *not* treating Robert for congestive heart failure. Dr. Holbert further testified Robert was taking Lasix and Lanoxin to reduce his salt and water balance, and not for treatment of congestive heart failure.

¶ 46. Vicky Lawrence ("Lawrence"), testifying on behalf of United, testified that nowhere in the medical records contained in the claims file were the words "congestive heart failure" mentioned. Lawrence further testified that after reviewing the claims file several times, she could not find any evidence that revealed any of the doctors told Robert he had congestive heart failure. In addition, Natalie testified she was never advised that her husband was being treated for congestive heart failure.

¶ 47. United's denial was allegedly based on Robert's answer of "no" to the application question of whether he had been treated for congestive heart failure dur-

ing the previous three years, claiming Robert's response was a material misrepresentation to United. Whitaker stated the sole reason for denial of the claim was this alleged material misrepresentation.

¶ 48. An attorney for United had advised the life claims department to contact Triplett and Natalie before formally denying the claim. On December 4, 1997, United sent a letter to Natalie stating it had determined Robert had failed to disclose past medical history. United asked Natalie to submit any comment on Robert's medical history and advised that no further action would be taken on the claim until she did. After receiving no response, United sent a second letter to Natalie, reiterating its position and inviting comment from Natalie. Natalie did not respond. At trial, Natalie testified she was too distraught to respond and in a "stoop" after her husband's death. United asserted it was unable to contact Triplett. Although United had Triplett's social security number, United asserted it did not have a correct address for Triplett after she was terminated from the company for reasons not disclosed in the record. United claimed it sent Triplett two letters.

¶ 49. Finally, on March 2, 1998, 278 days after Natalie's claim was filed, and 286 days after Robert's death, United sent a letter to Natalie formally denying her claim and refunding the premiums paid. Natalie later cashed this check. Natalie testified she was not aware that by cashing the check she was waiving any claims, and she still believed United owed her the policy proceeds. Natalie claimed since she had not received any money from United for such a long period, she was not financially stable and

needed the money so as not to get behind on bills. The check was payable without any restrictions.

¶ 50. In November of 1999, United received a letter from Natalie addressed to Triplett wherein Natalie inquired why her claim was denied. Due to United not having Triplett's current address, the letter was not forwarded to her. On December 9, 1999, Natalie wrote to the president of United to ask why her claim was denied. Whitaker testified the president did not personally see it, but that the letter was reviewed and filed in the Merrill claims file. On January 7, 2000, United sent a letter in response to Natalie. The letter stated United had once again reviewed Robert's medical records and was denying the claim. However, Whitaker testified that before this letter was sent, United made no effort to obtain any new medical records or information.

¶ 51. At trial, Natalie testified that because of the denial of the claim, she was forced to take out a loan to pay Robert's burial expenses of $5,583.00. Natalie made payments of $136.82 a month on the loan, and at the time of trial had paid $369.47 in interest. She stated she paid this loan for a period of forty-eight months. Natalie testified that it was necessary for her to work to pay off the loan. Natalie, age 71 at the time of trial, worked the graveyard shift at the Boomtown Casino from 11:30 p.m. to 7:30 a.m. Natalie testified she worked forty hours a week at the casino. Natalie testified she was "under great stress" trying to pay her bills and that she had seen a doctor because of "stress" and "nervousness." Natalie testified she further suffered anxiety when United sent two agents to her home *after her claim had been de-*

nied to tell her that her policy had lapsed due to unpaid premiums. Natalie testified it made "her feel bad because they didn't pay me in the first place, and then they come sending their men to my door." Natalie further testified this lawsuit caused her anxiety and was "upsetting her."

I. Whether the trial court erred in failing to grant United's Directed Verdict Motion, Peremptory Instruction, and Motion for Judgment Notwithstanding the Verdict.

¶ 52. "Our standard of review of a trial court's grant of a J.N.O.V., a peremptory instruction and a directed verdict is de novo...." *White v. Stewman,* 932 So.2d 27, 32 (Miss.2006). "In essence, judgments as a matter of law present both the trial court and appellate court with the same question-whether the evidence, as applied to the elements of a party's case, is either so indisputable, or so deficient, that the necessity of a trier of fact has been obviated." *Id.*

¶ 53. United's letter to Natalie on March 2, 1998, stated that since Natalie had not responded to its previous correspondence, United was forced to rely on the medical information it had, which showed Robert had congestive heart failure that was not disclosed to United. However, the evidence revealed that this was a false statement. The letter stated, "[W]e have no choice but to rely on the information contained in our file and take the necessary steps to return all premiums paid for Mr. Merrill's policy. Our check is enclosed. Again, this action is necessary since we would have been unable to approve Mr. Merrill for coverage under this plan...."

¶ 54. United did not assert the affirmative defense of accord and satisfaction in its original Answer. United moved to include this defense in its Amended Answer, two years after its original Answer was filed, three years after the suit was filed by Natalie, and six years after Robert's death. Nevertheless, the trial court allowed it over Natalie's objection.

¶ 55. At the end of Natalie's case, United moved for a directed verdict, which was denied by the trial court. United argues that it should have been granted a directed verdict, peremptory instruction, or JNOV, because Natalie cashed the refund check from United. It is United's contention that cashing the refund check represents mutual rescission and/or accord and satisfaction of the claim. Natalie points out that United did not plead this defense in its Answer; therefore this defense was waived.

¶ 56. When denying the directed verdict, the trial judge stated, "Though I am overruling *in toto* the defendant's Motion for JNOV ..., I am concerned that the plaintiff might have some *Oglesbee* problems.[3] In such situations, though, I believe the defendant must affirmatively show that the plaintiff knew she waived all her claims-if she did. We'll see what the Supreme Court says."

¶ 57. This Court has defined the elements of accord and satisfaction as:

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[3] *Oglesbee v. National Security Fire and Cas. Co.*, 788 F.Supp. 909 (S.D.Miss.1992)

> (1) Something of value offered in full satisfaction of a demand; (2) accompanied by acts and declarations as amount to a condition that if the thing offered is accepted, it is accepted in satisfaction; (3) the party offered the thing of value is bound to understand that if he takes it, he takes subject to such conditions; and (4) the party actually does accept the item.

Medlin v. Hazlehurst Emergency Physicians, 889 So.2d 496, 498 (Miss.2004) (citations omitted).

¶ 58. United unpersuasively argues that Natalie met all elements of this test, as she received the check on March 2, 1998, and cashed the check on April 24, 1998. Even though United presented no evidence that this check indicated it was for satisfaction of all claims, United argued Natalie should have been aware this check was in satisfaction of her claim, as she had knowledge the policy was being cancelled and that she further had knowledge she could consult with an attorney.

¶ 59. Natalie argues she does not meet this Court's requirements for accord and satisfaction. Natalie contends she neither believed nor understood that cashing the check would serve as release or waiver of her claim.

¶ 60. Neither the letter from United, nor the refund check, establish that the check was in satisfaction of the claim. United did not converse with Natalie at any time before issuing the check. Natalie testified she cashed the check because she was behind on her

bills and she still believed United owed her the money from the claim. Subsequent to cashing the check, Natalie wrote the letters to Triplett and the President of United asking why her claim had not been paid.

¶ 61. Additionally, Natalie argues contrary to United, that she did not consult a lawyer *before* cashing the check. Whether Natalie consulted a lawyer about the consequences of cashing the check is not made clear by the record. During trial Natalie was asked, "Do you remember testifying at your deposition, Ms. Merrill, that you didn't talk with anybody other than your lawyers when you cashed that check?" Natalie answered, "Right."

¶ 62. Based on the record before this Court, it is clear Natalie did not intend, nor did she fully understand cashing the check would constitute a waiver of her claim against United. "As clearly required by the first three elements of a valid accord and satisfaction, there must be a 'meeting of the minds of the parties.'" *Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.*, 857 So.2d 748, 754 (Miss.2003) (citations omitted). In the case sub judice, there clearly was no "meeting of the minds" between Natalie and United. This Court further held in *Chandeleur*, "[T]hat an obligee may execute a valid accord and satisfaction by cashing checks which were offered as full satisfaction of a demand." *Id.* (citations omitted). In United's correspondence to Natalie, there was no statement, or for that matter, any notice that United intended the check to be full satisfaction of the demand. Furthermore, the letter enclosed with check stated, "If you have information which you feel would

materially affect this decision ... please let us know." Thus, the letter encouraged a continuing dialogue between Natalie and United, as opposed to declaring that acceptance of the premium refund would satisfy the demand. *See Medlin*, 889 So.2d at 498.

¶ 63. Additionally, the jury found that Natalie's cashing of the check did not constitute accord and satisfaction, and this Court has held, "[a] jury should be allowed to decide the issue of whether a release was obtained in good faith and with the full understanding on the plaintiff's part of his legal rights." *Id.* (citations omitted). The elements of a valid accord and satisfaction and/or mutual rescission were not met, and the trial court did not err in denying United's directed verdict motion, peremptory instruction, and motion for judgment notwithstanding the verdict.

II. Whether, alternatively, a new trial is in order because the trial court erred in denying the use of medical records of Robert at trial and in denying United's Motions for a Mistrial or Continuance; erred in instructing the jury; and erred in evidentiary rulings.

A. Did the trial court err when it denied United the use of certain medical records at trial?

¶ 64. "Admission or suppression of evidence is within the discretion of the trial judge and will not be reversed absent an abuse of that discretion." *Haggerty v. Foster*, 838 So.2d 948, 958 (Miss.2002) (citations omitted). "Furthermore, where error involves the admission or exclusion of evidence, this Court 'will not reverse unless the error adversely affects a sub-

stantial right of a party.'" *Id.*

¶ 65. In a pretrial hearing, the judge stated United was only to gather medical records for "whatever the policy allowed them." The policy application requested medical information for the previous three years. The judge further stated, "I would say [gather] congestive heart failure records for that three year period."

¶ 66. Subsequently, United issued eleven subpoenas to medical providers. These subpoenas, which sought additional records, were not issued until six years after United denied Natalie's claim. Natalie filed a Motion to Quash these eleven subpoenas.[4] On July 23, 2004, a hearing was held on Natalie's Motion to Quash. The trial judge granted Natalie's Motion to Quash, but allowed United to make a proffer of the records in its possession.

¶ 67. United argues it was denied the use of these relevant medical records at trial. United states the records that were not admitted into evidence would prove that Robert was treated for congestive heart failure.

¶ 68. In its correspondence to Natalie, as well as through the depositions of its representatives, United stated the reason for denial of the claim was that it "received medical information indicating undisclosed medical history of congestive heart failure within the three year period prior to application."

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[4] Although this Motion was filed previous to the January 7, 2003, hearing, this Motion was not heard until July of 2004.

The medical records in the claims file were from doctors whom Natalie disclosed to United at its request while it was investigating Natalie's claim. United asserts, and Natalie concedes, that it requested and was given authorization by Natalie to obtain the medical records for *five* years. However, only records from the prior three years were requested from these physicians before Natalie's claim was denied. Whitaker, United's representative, testified the denial of Natalie's claim was based on the following, which was contained in Robert's claim file: the medical records from Dr. Eva Magiros, Dr. Robert Holbert and the Biloxi Medical Center. An employee of United, who had no medical training, reviewed these medical records, none of which included a diagnosis of "congestive heart failure." Notwithstanding the absence of a diagnosis, this employee decided Robert had had congestive heart failure within three years prior to his application and forwarded the claim to United's legal department and medical director for review.

¶ 69. As discussed *infra*, United's medical director, Dr. McCampbell, opined that Robert's medical records *indicated* congestive heart failure. A thorough review of the record for any substantiation of this conclusion by Dr. McCampbell cannot be found. Dr. McCampbell never contacted Robert's treating physicians, nor did he offer any reason, basis or fact to support his opinion that Robert had been treated for or diagnosed with congestive heart failure during the three-year period preceding application.

¶ 70. An insurance company must present an arguable, good-faith basis for denial of a claim. *See State*

Farm Ins. Co. v. Grimes, 722 So.2d 637 (Miss.1998); *Standard Life Ins. Co. v. Veal*, 354 So.2d 239 (Miss.1977). The record before us is devoid of any such basis. Every medical document for the three-year period preceding application contradicts the opinion of Dr. McCampbell. Accordingly, there is no proof of a good-faith basis for denial. Insurance companies are not free to employ medical directors who are in a position to recommend arbitrary denials. A medical opinion put forth by a medical director, without substantiation, is insufficient to deny a claim. Insurance companies must comply with the mandate of this Court to demonstrate an arguable basis for denial.

¶ 71. Additionally, Natalie argues that certain records were properly excluded, as the denial of the claim was based on whether Robert had congestive heart failure within the three years prior to the application for insurance. Natalie states these additional, subpoened records were not the medical records which were contained in Robert's claim file and relied upon to deny her claim.

¶ 72. The medical records at issue exceed the three-year time period which is stated on the application. With one exception,[5] the medical records not admitted by the trial court range in date from May 1989 to September 1991, well before the 1996 application. The letter of denial to Natalie clearly stated the denial was based on evidence of congestive heart failure from the medical records United possessed from

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[5] One of the subpoenas issued was to Dr. David Witty, who treated Robert on December 16, 1994. None of the records from Dr. Witty stated Robert had congestive heart failure.

the preceding three years. While this Court is confronted with multiple issues in this appeal, the issue of the basis for the denial of Natalie's claim is the most pertinent to our ruling. The medical records excluded were not utilized to deny Natalie's claim, nor do they provide evidence Robert suffered from or was treated for congestive heart failure from 1993 to 1996.

¶ 73. Evidence is always subject to the test of relevancy. In this case, the relevant records are the records upon which denial was based. As this Court does not want to favor suppression of discovery, we find the trial court erred in relying upon the *policy period* solely to determine which records should be excluded. We find the conduct of United should have been considered when determining which records were relevant. The relevancy of medical records was evidenced by United's pre-suit conduct. "An insurance company has exclusive control over evaluation, processing and denial of claims." *Andrew Jackson Life Ins. Co. v. Williams,* 566 So.2d 1172, 1189 (Miss.1990). United requested authorization to obtain records from the preceding five years, but this Court is befuddled by United's complaints about exclusion of the older records, given its decision to obtain only records from the preceding three years. As this is a lawsuit based on the denial of Natalie's claim, and United chose to base its denial only on the preceding three years, then United must be satisfied to use records from these three years to defend its denial.

¶ 74. At trial, United attempted to offer an alternative argument for denial of Natalie's claim. Even

though United's employee, Whitaker, testified that question six of the application was the only issue, United attempted to create an additional basis for denial based on application question eight at trial.[6] In the medical records which were excluded, United claimed there was information that Robert had been treated for cancer. A record dated August 13, 1990, from Dr. David Witty stated a "carcinoid tumor" was found in Robert's small bowel. However, Natalie disputes this was cancer and stated the tumor(s) were polyps which were removed from Robert's colon during a colonoscopy. While the trial judge denied United the use of these records, he reserved the right to reverse this ruling and allowed United to retain an expert to define and explain "carcinoid tumor." United failed to do so. Additionally, United never sought medical records regarding cancer prior to its denial of Natalie's claim.

¶ 75. As United did not base its denial of the claim on question eight of the application, nor did United utilize its opportunity to put on proof of carcinoid tumors at trial, the issue of the exclusion of these records is moot.

¶ 76. No proof was put forth to support the denial of Natalie's claim, nor were the excluded records utilized in the decision to deny Natalie's claim. While we find the trial court did not employ the correct reasoning for the exclusion of these records, we find the records were properly excluded from evidence.

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[6] Question eight states: "Within the past ten years, has the proposed insured been diagnosed as having, or received treatment for internal cancer?" Robert answered "no."

B. Did the trial court err in instructing the jury?

¶ 77. United claims the trial judge erred in granting numerous instructions. Natalie argues that "while, perhaps not perfect, the trial court's instructions, taken as a whole, certainly do not constitute reversible error."

¶ 78. "When we review a claim of trial court error in granting or denying jury instructions, we are required to read and consider all of the jury instructions together as a whole." *Burr v. Mississippi Baptist Medical Center,* 909 So.2d 721, 726 (Miss.2005) (citations omitted). "No instruction should be taken out of context or read alone in isolation." *Id. Richardson v. Norfolk & Southern Ry.,* 923 So.2d 1002, 1010 (Miss.2006) (citations omitted). "If all instructions taken as a whole fairly, but not necessarily perfectly, announce the applicable rules of law, no error results." *Milano v. State,* 790 So.2d 179, 185 (Miss.2001). Additionally, "with any granted jury instruction challenged on appeal, two questions are necessarily implicated: Does the instruction contain a correct statement of the law?, and Is the instruction warranted by the evidence?" *Hill v. Dunaway,* 487 So.2d 807, 809 (Miss.1986).

¶ 79. United claims that granting instructions P-9, P-10, and P-11[7] over its objections was error and that these instructions were contrary to law and to the proof presented. Although the instructions may have

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[7] Instruction P-9 primarily addressed the law of material misrepresentation, burden of proof and imputed knowledge; Instruction P-10 addressed imputed knowledge; and Instruction P-11 peremptorily instructed that Triplett was United's agent.

been contrary to United's theory of the case, the instructions are correct statements of the law and were supported by Natalie's proof.

¶ 80. United also submitted P-11 would confuse a jury. P-11 instructed the jury that United may be liable for actual damages for the actions of its agent. United asserts that the statement in the policy which read, "We are not bound by any promise or representation made by an agent or anyone else" exempted it from being held liable for the actions of Triplett when she sold the policy to the Merrills.

¶ 81. Grimland stated Triplett had the authority to act on behalf of United. There is sufficient proof to show Triplett was acting on behalf of United. Furthermore, according to the law of this state, the policy language cannot limit the responsibility of United. "We and other courts have held insurers to be bound by the actions of their agents acting within the course and scope of apparent authority *regardless of the policy's actual terms.*" *American Income Life Ins. v. Hollins*, 830 So.2d 1230, 1237 (Miss.2002) (emphasis added). Accordingly, Instructions P-9, P-10 and P-11 were properly given by the court.

¶ 82. United also submits that the granting of Instruction P-26 and the refusal of its Instruction DUA-14 at the conclusion of the compensatory phase was error. Instruction P-26 stated, *inter alia,* that if the jury found United breached the contract, that the jury could consider the mental pain, anxiety and emotional distress when determining the award. Instruction DUA-14 stated the jury could not find for Natalie in any amount beyond reasonable compensa-

tion for actual damages sustained, if any. This was covered by the other instructions of the court.

¶ 83. At trial, United objected to P-26 asserting "Mississippi law ... would not allow recovery of mental anguish and emotional distress damages for breach of contract alone, absent there being some additional element...." Additionally, United argues this instruction is violative of Miss.Code Ann. Sect. 11-1-65 and this Court's recent decision in *Hartford Underwriters Insurance Co. v. Williams,* 936 So.2d 888 (Miss.2006).

¶ 84. Natalie argues that P-26 is proper under Mississippi law. Natalie asserts the trial was bifurcated by agreement of the parties, and that the jury was not instructed that it could consider punitive damages in the first, compensatory phase of the trial. The record supports the granting of Instruction P-26. United's reliance on *Hartford* is misplaced. In *Southwest Regional Medical Center v. Lawrence,* this Court held:

> This Court traditionally held that emotional distress and mental anguish damages are not recoverable in a breach of contract case in the absence of a finding of a separate independent intentional tort. (citations omitted).
>
> In recent years this Court has moved away from this requirement.
>
> ...
>
> In *Universal Life Ins. Co. v. Veasley,* 610 So.2d 290 (Miss.1992), we applied this rule to breach of contract cases stating:

> Some justices on this court have suggested that extra-contractual damages ought be awarded in cases involving a failure to pay on an insurance contract without an arguable reason even where the circumstances are not such that punitive damages are proper. [citations omitted]. Applying the familiar tort law principle that one is liable for the full measure of the reasonably foreseeable consequences of her actions, it is entirely foreseeable by an insurer that the failure to pay a valid claim through the negligence of its employees should cause some adverse result to the one entitled to payment. Some anxiety and emotional distress would ordinarily follow, especially in the area of life insurance where the loss of a loved one is exacerbated by the attendant financial effects of that loss. Additional inconvenience and expense, attorneys fees and the like should be expected in an effort to have the oversight corrected. It is no more than just that the injured party be compensated for these injuries.
>
> *Veasley*, 610 So.2d at 295.

Southwest Miss. Regional Medical Ctr. v. Lawrence, 684 So.2d 1257, 1269 (Miss.1996).

¶ 85. Consistent with this Court's holding in *Stewart*, 846 So.2d at 200, Natalie presented proper evidence for compensation of emotional distress. The grant of Instruction P-26 and denial of Instruction DUA-14 were not error.

¶ 86. United further asserts the granting of Instruction P-21 was error. Instruction P-21 stated, *inter alia,* "If you find from a preponderance of the evidence that United American failed to conduct a reasonably prompt and adequate investigation, and if you further find from a preponderance of the evidence in this case that its failure, if any, caused the denial of a valid claim, then your verdict may be for the plaintiff." The duty of United to reasonably investigate a claim is discussed *supra.* This instruction was properly supported by proof in the record, as well as by this Court's decision in *Bankers Life and Casualty Co. v. Crenshaw,* 483 So.2d 254 (Miss.1985).

¶ 87. United asserts the trial court further erred in changing the word "must" to the word "may" in its Instructions DUA-7 and DUA-9. Other than because it was "fair" due to Natalie changing the wording in two of her jury instructions, the judge did not give a reason for changing the wording in these two instructions. While the instructions may not read "perfectly" due to the change, they do follow the "applicable rule of law," and therefore, do not result in error. *See Milano v. State,* 790 So.2d 179 at 185 (Miss.2001). Furthermore, as to Instruction DUA-9, United did not object to changing the wording of this instruction and therefore, may not raise the issue on appeal. "Where a party fails to make a contemporaneous objection to a proposed jury instruction so that the trial court has an opportunity to cure the defect, we are procedurally barred from considering arguments that the trial court erred in submitting the instruction." *Nunnally v. R.J. Reynolds Tobacco Co.,*

869 So.2d 373, 378 (Miss.2004) (citing *Haggerty v. Foster,* 838 So.2d 948, 954 (Miss.2002)).

¶ 88. Finally, United asserts the trial court erred in failing to grant an ore tenus, unnumbered instruction submitted by it, which stated:

> If you find from a preponderance of the credible evidence that the defendant United American tendered the refund of premium check and that Plaintiff Natalie Merrill knew at the time of tender that the insurance company defendant United American had no intention of paying the claim, and you find from a preponderance of the credible evidence that Plaintiff Natalie Merrill thereafter negotiated and cashed the check with knowledge that defendant United American had tendered the check and that Plaintiff Natalie Merrill fully understood that United American at the time had no intention of paying on the policy, then your verdict shall be for defendant United American.

¶ 89. The trial judge ruled this instruction was covered "by the waiver and/or accord and satisfaction instructions. So, this would merely be cumulative." After reviewing DUA-9, the given instruction on accord and satisfaction, the Court finds that the instruction at issue is virtually identical to DUA-9 and would render the same result. DUA-9 gives the correct statement of law pursuant to this Court's decision in *Medlin,* 889 So.2d at 498 (Miss.2004). The trial court correctly stated the giving of the instruction at issue would be cumulative.

¶ 90. Accordingly, we find that the instructions given by the trial court, taken as a whole, were proper.

C. Did the trial court err in certain evidentiary rulings?

¶ 91. "Our well-established standard of review for the trial court's admission or suppression of evidence, including expert testimony, is abuse of discretion. We give great deference to the discretion of the trial judge." *Miss. Transp. Comm'n v. McLemore,* 863 So.2d 31, 34 (Miss.2003). "Unless we conclude that the discretion was arbitrary and clearly erroneous, amounting to an abuse of discretion, that decision will stand." *Tunica County v. Matthews,* 926 So.2d 209, 212-213 (Miss.2006) (citations omitted).

¶ 92. After review of Natalie's brief, the Court discovered that while offering pertinent cites to the record, Natalie did not offer a single authority in her response to United's argument on erroneous evidentiary rulings. This omission was further recognized in United's reply brief. Due to Natalie's failure to cite any legal authority, this Court is not bound to consider her argument on this issue. "This issue is not properly before the Court pursuant to M.R.A.P 28(a)(6) which states that an argument in the appellate's brief 'shall contain the contentions of appellant with respect to the issue presented, and the reasons for those contentions, with citations to the authorities, statutes, and parts of the record relied upon.'" *Conley v. State,* 790 So.2d 773, 784 (Miss.2001) (citation omitted). However, for informational purposes, we will address the arguments on this issue.

¶ 93. United submits that the trial court should not have allowed the deposition testimony of two employees of United, wherein they testified to United's obligations regarding the policy. United submits the following portions of testimony were allowed in error:

> 1) United employee, Sam Smith, testified that Robert could not make a misrepresentation by signing the application if he had never been told that he had been treated for congestive heart failure.
>
> 2) United employee, Sandra Whitaker, testified that the only representation Robert made through the application was that the statements and answers therein were full, complete and true to the best of Robert's knowledge, and that United did not require Robert to ask his physicians whether he had any of the conditions listed on the application.

¶ 94. United argues this testimony wrongfully placed the burden on it to show that Robert made an intentional misrepresentation and that Smith was being asked to define material misrepresentation under Mississippi law. Further, United argues this testimony shows United was not entitled to cancel the policy unless it proved Robert *knew* he had congestive heart failure. Upon ruling on United's objection to this testimony, the trial judge stated that while Natalie could not ask these witnesses' opinions on misrepresentation under Mississippi law, he was taking the answers of these witnesses "to be couched

in terms of policies-insurance policy, nomenclature, and the company definitions...." The trial judge further ruled these employees should be able to testify to language which their company drafted.

¶ 95. Although this Court has stated, "the interpretation of insurance policy language is a question of law," the trial judge was correct that this testimony merely spoke to Robert's agreement to the policy which United drafted. The testimony did not attempt to interpret the actual language of the policy. The trial judge did not abuse his discretion in allowing this testimony.

¶ 96. United further objected to the portion of testimony wherein Triplett was asked, "Do you have an opinion about whether or not United American should have paid Ms. Merrill's claims?" Triplett answered, "I think they should have paid the lady." At trial, United objected that this was a legal conclusion and that Triplett should not be able "testify that we owe the claim." The trial judge overruled the objection and stated her answer was not a legal conclusion, but a question of standards in the insurance business. The trial judge was correct in his ruling. Triplett was correctly allowed to state her *opinion* on this matter pursuant to Mississippi Rules of Evidence 701 and 704 and their Comments.

¶ 97. Additionally, United objected to the testimony of Triplett wherein she stated: 1) that she did not tell the Merrills about any contestability clause in the policy; 2) that United did not tell Triplett there was a contestability clause in the policy; and 3) that Triplett thought it would have been important for

the Merrills to know about the contestability clause in the policy. United argues that knowledge of the contestability clause should have been imputed to the Merrills as "it is the law that a person is bound by the contract, the documents that they sign." However, the Merrills did not have this information at the time they applied, as they were not issued the policy simultaneously with their application. *See Stephens v. Equitable Life Assur. Soc. of the US*, 850 So.2d 78, 83 (Miss.2003)). This might be true as applied to the Merrills after they received the policy, but not as to Triplett. Triplett is an agent of United and pursuant to this Court's holding in *Hollins*, United is bound by Triplett acting within the scope of her authority. *See Hollins*, 830 So.2d at 1237. The trial judge did not abuse his discretion by allowing this testimony.

¶ 98. United further asserts Triplett should not have been allowed to testify that she was told by Parker and Associates that a claim would be paid in thirty days and that she relayed this information to the Merrills. In its appellate brief and argument to the trial court, United simply states there are relevance and hearsay violations pursuant to Mississippi Rules of Evidence 401, 403, and 801, but fails to give any explanation as to why. United additionally reiterates its argument that the terms and conditions of the policy were clear and that the Merrills were subject to these terms. However, as an agent for United, United is bound by the information Triplett gave regarding the policy. *See Hollins*, 830 So.2d at 1237. The trial judge did not abuse his discretion by allowing this testimony.

¶ 99. Over the objection of United, Triplett was further allowed to testify: 1) that Parker and Associates was involved in a dishonest scheme because she did not receive any training; 2) that she was allowed to go out "foot free and loose," but was accountable when "things happened;" and 3) that she was exploited and pushed to bring in money. United argues that pursuant to M.R.E. 401 and 403, the value of this testimony was substantially outweighed by the prejudice to United and that it was not relevant to the issues presented at trial. The questions which elicited this testimony from Triplett were asked by counsel for United. Although United argues Parker and Associates was responsible for training Triplett, Triplett was an agent for United and it was responsible for her actions. The training of agents who will solicit answers from prospective insureds which may result in material misrepresentations, is pertinent to the resolution of the issues of this case and meets the requirements of M.R.E. 701 and its comment. The trial judge did not abuse his discretion by allowing the preceding testimony.

¶ 100. This Court has stated, "The reviewing court may reverse a case only if, 'the admission or exclusion of evidence ... results in prejudice and harm or adversely affects a substantial right of a party.'" *Blake v. Clein*, 903 So.2d 710, 723 (Miss.2005) (quoting *K-Mart Corp. v. Hardy*, 735 So.2d 975, 983 (Miss.1999)). Accordingly, the trial judge did not abuse his discretion when excluding these records.

III. Did the trial court err in submitting extracontractual/punitive damages to the jury?

¶ 101. "An abuse of discretion standard is used when this Court reviews the trial court's decision on whether a case warrants punitive damages to be considered by the trier of fact." *Bradfield v. Schwartz,* 936 So.2d 931, 936 (Miss.2006) (citations omitted).

> As a general rule, exemplary or punitive damages are 'added damages' and are in addition to the actual or compensatory damages due because of an injury or wrong. The kind of wrongs to which punitive damages are applicable are those, which besides the violation of a right or the actual damages sustained, import insult, fraud, or oppression and not merely injuries, but injuries inflicted in the spirit of wanton disregard for the rights of others.

Id. (citations omitted).

¶ 102. Pursuant to Miss.Code Ann. Sect. 11-1-65, this trial was bifurcated, and the trial judge submitted the punitive damages issue to the jury after a finding for compensatory damages. The jury awarded Natalie $900,000 in punitive damages. Citing *State Farm Automobile Insurance v. Campbell,* 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), the trial court found this award to be proper after remittitur, as this amount did not exceed nine times Natalie's compensatory damages, the guideline suggested in *Campbell.*

¶ 103. United argues the trial court erred in submitting the punitive damages issue to the jury for two reasons. The first of these is that Natalie was denied

her motion for directed verdict. In its brief, United relies on this Court's holding in *State Farm Mutual Auto Insurance Co. v. Grimes,* wherein this Court held that after denial of a motion for directed verdict on a contract claim, this denial "generally indicates that a punitive damage instruction should not have been submitted." *State Farm Mut. Auto. Ins. Co. v. Grimes,* 722 So.2d 637, 640 (Miss.1998). Nevertheless, United failed to cite the very next sentence which held, "However, this Court has, in recent cases, backed away from a blanket holding that a punitive damages instruction should be not submitted to the jury if a directed verdict was denied on the underlying contract." *Grimes* further held, "This Court in [*Dixie Insurance v.] Mooneyhan[,* 684 So.2d 574 (Miss.1996)], thus noted that a judge may validly conclude that an insurer lacked an arguable reason to deny the claim and that it acted in bad faith *notwithstanding the fact that he refused a directed verdict on the underlying contract claim." Id.* at 640 (emphasis added). Accordingly, United's argument that the trial judge erred in submitting the punitive damages issue to the jury due to the denial of the motion for directed verdict is without merit.

¶ 104. This Court has held,

> The issue of punitive damages should not be submitted to the jury unless the trial court determines that there are jury issues with regard to whether:
> 1) The insurer lacked an arguable or legitimate basis for denying the claim, and,
> 2) The insurer committed a wilful or malicious wrong, or acted with gross and reckless

disregard for the insured's rights.

Hollins, 830 So.2d at 1239 (citations omitted).

¶ 105. In *Windmon v. Marshall,* this Court, citing *Murphree v. Federal Insurance Co.,* held, "[I]f there is a finding that there was a reasonable arguable basis to deny the claim then the [appellant] is not entitled to have the jury consider any bad faith award against the insurance company." *Windmon v. Marshall,* 926 So.2d 867, 872 (Miss.2006) (citing *Murphree v. Federal Ins. Co.,* 707 So.2d 523, 529 (Miss.1997)). United claims its arguable basis for denial is the dispositive issue on which to decide that the trial court erred in its decision to submit punitive/extracontractual damages to the jury.

¶ 106. "Where an insurance carrier denies or delays payment of a valid claim, punitive damages will not lie if the carrier has a reasonable cause for such denial or delay." *Murphree,* 707 So.2d at 529. United unpersuasively argues it had an arguable basis for denying the claim. United submits that at trial, it showed that question six on the policy should have been answered "yes" as to congestive heart failure. United submits it provided proof of this through two cardiologists (one of whom was the medical director for United) who testified, based on the medical records obtained by United, that Robert was treated for congestive heart failure in the three years preceding the application. United argued that the claim file showed Robert's family doctor treated Robert for ischemic cardiomyopathy and coronary artery disease, although neither condition is included in the application questionaire.

¶ 107. Natalie argues, to the contrary, that United did not have an arguable basis for denying the claim based on this Court's holding in *Williams.* In *Williams,* the application form was filled out by the agent for Andrew Jackson and the application did not include a heart condition which Williams stated he disclosed to the agent. Further, Williams claimed the agent misrepresented the provisions of the policy to him. *See Williams,* 566 So.2d at 1187. *Williams* held, "Such misrepresentations created a jury issue of whether Andrew Jackson's denial was arguable." *Id.* Natalie asserts her facts are analogous to the facts in *Williams* because Robert revealed to Triplett, who filled out the application, that he had had by-pass surgery and even showed her his scar. Further, Triplett failed to include this information on Robert's application. This Court has held, "We have not hesitated to allow jury consideration of punitive damages in cases where an insurer denied a claim because of a material misrepresentation made by an agent." *Lewis v. Equity Life,* 637 So.2d 183, 186 (Miss.1994).

¶ 108. Natalie further disputes the evidence put forth by United to claim it had an arguable basis for denial. Natalie submits that, although United's medical director testified Robert's medical records indicated he had congestive heart failure, "none of the documents which it based its denial on contained the words congestive heart failure, and that none of those documents state anywhere, nor contain any evidence, that Mr. Merrill was told by a doctor or anyone else that he had or had been treated for congestive heart failure."

¶ 109. These arguments by the parties clearly presented a factual dispute for which a jury determination was necessary and proper. "[W]here the parties dispute the existence and legitimacy of the carrier's reason for delay or denial, these issues are ones of material fact, and the plaintiff is entitled to have a jury pass upon his claim for punitive damages if reasonable minds could differ as to the legitimacy of the carrier's reason." *Murphree*, 707 So.2d at 529 (citations omitted). Thus, the first requirement for submitting punitive damages to the jury, pursuant to *Hollins*, was met. *See Hollins*, 830 So.2d at 1239.

¶ 110. As to the second prong stated in *Hollins*, United provides only a citation and states it did not act with gross negligence or reckless disregard for Natalie's rights, but provides no argument.

¶ 111. Natalie submits to this Court that United acted with gross negligence and reckless disregard for her rights, as United did not conduct a proper investigation. *Lewis* held, "'[T]he denial of a claim without proper investigation may give rise to punitive damages.'" *Lewis*, 637 So.2d at 187 (citing *Crenshaw*, 483 So.2d at 276). "Proper investigation, the *Crenshaw* court held, means obtaining 'all available medical information relevant to [the policyholder's] claim.'" *Id.* (citing *Crenshaw*, 483 So.2d at 272). United failed to undertake a full investigation of Natalie's claim until after it was denied. Furthermore, as recommended by United's legal department, United failed to obtain a statement from Triplett, as United attempted to contact her only once by phone. Natalie also argues the delay of the claim denial for 278 days shows negligence and reckless disregard for

her rights. Lastly, Natalie states United acted recklessly when it sent two representatives to her home to collect premiums *after* her claim had been denied. Natalie stated it caused her to be upset when two men from United knocked on her door and upon Natalie asking them to leave, they presented to her a card from United which stated she still owed the $54.00 a month premiums.

¶ 112. Natalie submits that the amount of damages awarded was proper. United argues that extracontractual/punitive damages should not have been submitted to the jury *at all.* However, United did not contest the *amount* of damages awarded, either in its pleadings, or during oral argument before this Court.

¶ 113. Mississippi law recognizes four factors to be applied in determining the amount of punitive damages:

> 1) The amount should punish the insurer and deter it from engaging in similar actions in the future.
> 2) The amount should serve as a deterrent for others.
> 3) The amount should account for the insurer's financial worth.
> 4) The amount should compensate the plaintiff for her public service in holding the insurer accountable.

Williams, 566 So.2d at 1190.

¶ 114. Natalie argues all elements have been met, that United should be punished for its actions, and

that this award will be for the public good. Natalie further states this award is sufficient to punish United, and to deter it from taking similar actions, and that it compensates her for her public service in holding United accountable. Further, United's net worth was shown to be $184,638,000 after having paid dividends to its parent company of $128,000,000.

¶ 115. This award is less than five times the amount of compensatory damages and is less than one-half of one percent of United's net worth. Further, as stated by the trial judge in his opinion, this award is consistent with this Court's holding in *Hollins,* 830 So.2d at 1241-42, and with the holding of the United States Supreme Court in *State Farm v. Campbell. Campbell* held, "[C]ourts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. at 426, 123 S.Ct. 1513.

¶ 116. "Measurement of the amount is solely fettered to the jury's discretion." *Williams,* 566 So.2d at 1190. Furthermore, "We will disturb a jury verdict on appeal only if it 'is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice.'" *Burr v. Miss. Baptist Med. Ctr.,* 909 So.2d 721, 730 (Miss.2005).

¶ 117. Additionally, "[w]here punitive damages are awarded by the jury, attorney's fees are justified. The reasonableness of an attorney's fee award is determined by reference to the factors set forth in Rule 1.5 of the Mississippi Rules of Professional Conduct."

Miss. Power & Light Co. v. Cook, 832 So.2d 474, 486 (Miss.2002) (internal citations omitted). The attorney's fees awarded to Natalie were reasonable, as stipulated by United, without waiving its argument that attorney's fees should not have been considered by the jury at all.

¶ 118. The final judgment comports with the law of this state and that of the United States, and was supported by substantial evidence.

> In the insurance context a special relationship arises out of the parties' unequal bargaining power and the nature of insurance contracts which would allow unscrupulous insurers to take advantage of their insureds' misfortunes in bargaining for settlement or resolution of claims. In addition, without such a cause of action insurers could arbitrarily deny coverage and delay payment of a claim with no more penalty than interest on the amount owed. An insurance company has exclusive control over evaluation, processing and denial of claims. For these reasons, a duty is imposed that '[an] indemnity company is held to that degree of care and diligence which a man of ordinary care and prudence would exercise in the management of his own business.'

Williams, 566 So.2d at 1189 (Miss.1990).

¶ 119. After review of the record and the evidence presented, the Court finds United failed to meet the duties the law imposes. Finally, no errors occurred

during trial which prejudiced the rights of United.

¶ 120. Lastly, a duly empaneled jury rendered a verdict in this case. This Court has held, "that the jury's verdict may be interfered with if it is found 'arbitrary or unreasonable' or 'against the overwhelming weight of the evidence....' " *Crenshaw,* 483 So.2d at 278. The verdict in this case meets neither of these descriptions and should be upheld.

¶ 121. **AFFIRMED.**

SMITH, C.J., WALLER AND DIAZ, P.JJ., EASLEY, CARLSON, GRAVES, DICKINSON, AND LAMAR, JJ., CONCUR.

FILED
JASPER COUNTY, MISS.
SEP 14 2004
SHERRY BRELAND
CIRCUIT CLERK

IN THE CIRCUIT COURT OF JASPER COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

NATALIE MERRILL	PLAINTIFF
VERSUS	CAUSE NO. 10-0075
UNITED AMERICAN INSURANCE, et al.	DEFENDANTS
FANNIE L. TRIPLETT	CROSS-CLAIMANT/ COUNTER-DEFENDANT
VERSUS	
UNITED AMERICAN INSURANCE COMPANY	DEFENDANT

JUDGMENT

THIS CAUSE came on for trial on Monday, August 2, 2004, during the regular August 2004 term of Court. A jury consisting of Dawn T. Mullins and eleven (11) other good and lawful jurors of the First Judicial District of Jasper County was sworn and impaneled as provided by law to hear the case. All of the parties presented their evidence, both oral and documentary, and rested. Following instructions of

the law and argument of counsel, the jury retired to deliberate and, following proper deliberations, returned and announced the following verdicts, which were read aloud in open Court:

> "We, the Jury, find for the Plaintiff, Natalie Merrill, and against the Defendant, United American Insurance Company in the amount of $500,000.00 compensatory damages."

> "We, the Jury, find for the Cross-Claimant, Fannie Triplett, and against the Cross-Defendant, United American Insurance Company in the amount of $250,000.00 compensatory damages."

With regard to the Plaintiff's claims against the Defendant, Fannie Triplett, the jury announced its verdict, which was read aloud in open Court, finding for the Defendant, Fannie Triplett.

Following the verdicts awarding the Plaintiff, Natalie Merrill, and Cross-Claimant, Fannie Triplett, the compensatory damages aforesaid, the Court found there was sufficient evidence to submit the issue of punitive damages on each claim to the jury. The jury heard additional evidence relative to Plaintiff's claims for tortuous (bad faith) breach of contract and relevant to the Cross-Claimant's claims for punitive damages, after which all parties rested.

Following instructions of the law and argument of counsel, the jury retired to deliberate and, following proper deliberations, returned and announced the following verdicts, which were read aloud in open Court:

> "We, the Jury, find for the Plaintiff, Natalie Merrill, and against the Defendant, United American, on the Plaintiff's claim for tortuous (bad faith) breach of contract, and award punitive damages in the amount of $900,000.00."
>
> "We, the Jury, find' for the Cross-Claimant, Fannie Triplett, and against the Defendant, United American, and award punitive damages in the amount of $900,000.00."

Upon Motion of the Defendant, United American, the jury was polled by the Circuit Court Clerk, and each individual juror reported that the announced verdicts were his or her verdicts, and the verdicts of the jury.

Following the jury's finding that the Plaintiff, Natalie Merrill, was entitled to punitive damages, counsel for the Plaintiff moved *ore tenus* for attorneys' fees, costs and expenses for prosecuting Plaintiff's claims through the trial of this matter. The Court instructed Plaintiff's counsel to submit a written motion requesting attorneys' fees, costs and expenses of this action, and, after considering the pleadings, arguments of counsel, and authorities, the Court finds that an award of attorneys' fees and costs of action to the Plaintiff is appropriate. The Court further finds that counsel for the Defendant, United American Insurance, stipulated that the amount of attorneys' fees submitted by the Plaintiff was reasonable (but denied that Plaintiff was entitled to recover said fees and expenses); that the costs and ex-

penses submitted by the Plaintiff were certified by affidavit; and the Court finds, therefore, that the total sum of $527,474.69 in attorneys' fees, costs and expenses submitted by the Plaintiff is reasonable and should be awarded to the Plaintiff.

In its post trial Motions the Plaintiff also asked that the Court award post-judgment interest in the amount of 8% per annum, and, finding that the Plaintiff included a demand for pre-judgment and post-judgment interest in her Complaint, the Court finds that post-judgment interest should be awarded in the amount of 8% per annum.

The Cross-Claimant, Fannie Triplett, also moved the Court *ore tenus* to award post-judgment interest in the amount of 8% per annum, and the Court finds that post-judgment interest should be awarded in the amount of 8% per annum.

IT IS, THEREFORE, ORDERED AND ADJUDGED:

I. That the Plaintiff, Natalie Merrill, shall have and recover from the Defendant, United American Insurance Company, and said Defendant shall pay to the Plaintiff, the following amounts: (1) $500,000.00 in compensatory damages as set forth hereinabove; (2) $900,000.00 in punitive damages as set forth hereinabove; (3) $527,474.69 in attorneys' fees, costs and expenses as set forth hereinabove; for a total judgment to be paid to the Plaintiff, Natalie Merrill, by the Defendant, United American, in the amount of $1,927,474.69, plus post-judgment interest in the amount of 8% per annum on the total judgment aforesaid, said interest to commence the date

this Judgment is stamped "Filed" by the Circuit Court Clerk;

II. That the Cross-Claimant, Fannie Triplett, shall have and recover from the Defendant, United American Insurance Company, and the Defendant shall pay to the Cross-Claimant, the following amounts: (1) $250,000.00 in compensatory damages as set forth hereinabove; and (2) $900,000.00 in punitive damages as set forth hereinabove; for a total judgment to be paid to the Cross-Claimant, Fannie Triplett, by the Defendant, United American Insurance Company, in the amount of $1,150,000.00, plus post-judgment interest in the amount of 8% per annum on the total judgment aforesaid, said interest to commence the date this Judgment is stamped "Filed" by the Circuit Court clerk; and

III. That the Plaintiff's claims against the Defendant, Fannie Triplett, shall be dismissed, with prejudice with each party to bear its own costs as to those claims.

SO ORDERED AND ADJUDGED on this, the 13th day of September 2004.

/s/ Robert G. Evans
ROBERT G. EVANS, JUDGE
THIRTEENTH CIRCUIT COURT
STATE OF MISSISSIPPI

FILED
JASPER COUNTY, MISS.
DEC 17 2004
SHERRY BRELAND
CIRCUIT CLERK

IN THE CIRCUIT COURT OF JASPER COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

NATALIE MERRILL	PLAINTIFF
VS.	CAUSE NO. 10-0075
UNITED AMERICAN INSURANCE COMPANY	DEFENDANT
FANNIE L. TRIPLETT	CROSS-CLAIMANT
VS.	
UNITED AMERICAN INSURANCE COMPANY	CROSS-CLAIMANT

FINDINGS AND ORDER DENYING IN PART AND GRANTING IN PART UNITED AMERICAN INSURANCE COMPANY'S MOTION FOR JUDGMENTS NOTWITHSTANDING THE VERDICTS OR, IN THE ALTERNATIVE, NEW TRIALS OR REMITTITURS

THIS CAUSE came on to be heard on the Defendant United American Insurance Company's motions for judgments notwithstanding the verdicts or,

in the alternative, for new trials or remittiturs; and the Court, after having considered the same, being fully advised in the premises, is of the opinion and so finds, as follows, to-wit:

I.

That United American Insurance Company's motions for judgments notwithstanding the verdicts should be, and the same hereby are, denied.

II.

That United American Insurance Company's motions for new trial should be, and the same hereby are, denied.

III.

That United American Insurance Company's motion for remittitur as to compensatory damages awarded Ms. Triplett should be, and the same hereby is, granted.

Ms. Triplett sued United American Insurance Company for attorneys' fees incurred by reason of United American's failure to defend her in Ms. Merrill's suit. By a preponderance of the evidence, Ms. Triplett proved her attorneys fees to be $75,000.00 but offered no proof of other damages. Therefore, remittitur a of $175,000.00 should be entered, reducing her compensatory damages award to $75,000.00.

IV.

That United American Insurance Company's motion for remittitur as to punitive damages awarded Ms. Trilpett should be, and the same hereby is, granted.

With regard to Ms. Triplett's punitive damages, this Court is mindful that the United States Supreme Court has stated, ". . . few awards exceeding a single digit ratio between punitive and compensatory damages . . . will satisfy due process."

State Farm Mutual Automobile Insurance Company v. Campbell, et al., 538 U.S. 408 (2003). Since nine times Ms. Triplett's compensatory damages is $675,000.00, a remittitur of $225,000.00 should be entered, thus reducing her punitive damages award to $675,000.00.

IV.

That United American Insurance Company's motion for remittitur as to compensatory damages awarded Ms. Merrill should be, and the same hereby is, granted. With regard to Ms. Merrill's compensatory damages, this Court compared her damages to those listed in *Stewart v. Gulf Guaranty Insurance Co.*, 846 So.2d 192 (Miss. 2002)) (see page 199). In that case, the Mississippi Supreme Court found that the plaintiff's emotional distress justified a compensatory award of $500,000.00 over and above his $3500.00 contractual damages, *Stewart v. Gulf Guaranty Insurance Co.*, 846 So.2d at page 200. (Of course, *Stewart* did not set a "cap" on such damages, but it was a helpful guide.) From that analysis, it is this Court's opinion that Ms. Merrill's evidence justifies an award of $200,000.00; and that the amount awarded in excess thereof is contrary to the overwhelming weight of the evidence. Therefore, a remittitur of $300,000.00 should be awarded, thus reducing Ms. Merrill's compensatory damage award to $200,000.00.

V.

That United American Insurance Company's motion for remittitur as to punitive damages awarded Ms. Merrill should be, and the same hereby is, denied.

As much deference as possible must be given to the jury's verdict; since nine times Ms

Merrill's compensatory damages (after the remittitur) exceeds the punitive award set by the jury, the punitive damage award to Ms. Merrill will stand as the jury determined.

VI.

That United American Insurance Company's motion regarding award of attorneys fees' to Ms. Merrill should be, and the same hereby is, denied.

The issue of attorneys' fees, costs, and expenses incurred by Ms. Merrill has been well briefed and well argued by counsel for the parties. The Court, therefore, adopts its earlier findings and ruling awarding attorneys fees; and attorneys fees of $527,474.69 heretofore awarded will remain undisturbed.

That post-judgment interest at the rate of 8% per annum, as determined by previous motions, briefs, and arguments, should be awarded in accordance with the "Judgment" filed and enrolled in this cause on the 14th day of September, 2004.

VIII.

As per Section 11-1-55, *Mississippi Code of 1972, Annotated,* Ms. Merrill and Ms. Triplett each have the option of accepting the remittitur or a new trial on damages only. Their respective counsel should be, and the same hereby are, ordered and directed to file a formal statement with the Court expressing their intentions in this regard, after which the appropriate order shall be enrolled.

SO ORDERED AND ADJUDGED, on this the 10th day of December, 2004.

/s/ Robert G. Evans
ROBERT G. EVANS, JUDGE

THIRTEENTH CIRCUIT
COURT
STATE OF MISSISSIPPI

FILED
JASPER COUNTY, MISS.
JAN 05 2005
SHERRY BRELAND
CIRCUIT CLERK

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF JASPER COUNTY, MISSISSIPPI

NATALIE MERRILL — PLAINTIFF

VS. — CIVIL ACTION NO. 10-0075

UNITED AMERICAN INSURANCE COMPANY; — DEFENDANTS
FANNIE L. TRIPLETT;
and JOHN AND JANE DOE A, B, C, AND D

FINAL JUDGMENT

This matter is now before the Court in light of: (1) the Judgment entered on September 14, 2004; (2) Defendant and Cross-Defendant United American Insurance Company's Motion for Judgment(s) Notwithstanding the Verdicts or, in the Alternative, New Trials or Remittiturs filed September 22, 2004, being hereby considered by the Court as renewed and rejected for all record purposes after entry of this Final Judgment, except to the extent granted by the Order of the Court referred to in sub-paragraph (5) hereof; (3) Plaintiff's Response in Opposition to United American Insurance Company's Motion for Judgment(s) Notwithstanding the Verdicts or, in the Alternative, New Trials or Remittiturs; (4) presenta-

tion to the Court of a Judgment of Dismissal With Prejudice as to all claims of Cross-Claimant Fannie L. Triplett against Cross-Defendant United American Insurance Company, reflecting that all such claims have been resolved, and therefore making it unnecessary for the Court to further address herein the status of the matter in regard to any claims of, or awards in favor of, Cross-Claimant Fannie L. Triplett against Cross-Defendant United American Insurance Company; (5) the Findings and Order Denying in Part and Granting in Part United American Insurance Company's Motion for Judgments Notwithstanding the Verdicts or, in the Alternative, New Trials or Remittiturs attached hereto as Exhibit "A" and issued by the Court on December 10, 2004; and (6) Plaintiff's Acceptance of Remittitur for the Purposes of Facilitating Entry of Final Judgment served by Plaintiff's counsel on December 14, 2004.

Considering all of the above, it is hereby ordered and adjudged that, as a Final Judgment, Plaintiff, Natalie Merrill, shall have and recover from the Defendant, United American Insurance Company, and the Defendant, United American Insurance Company, shall pay to the Plaintiff, Natalie Merrill, the following amounts: (1) $200,000.00 in compensatory damages; (2) $900,000.00 in punitive damages; and (3) $527,474.69 in attorneys' fees, costs and expenses; for a total judgment to be paid by the Defendant, United American Insurance Company, to the Plaintiff, Natalie Merrill, in the amount of $1,627,474.69, plus post-judgment interest in the amount of 8% per annum on the total amount aforesaid, said interest to commence as of September 14, 2004.

SO ORDERED AND ADJUDGED, on this the 5th day of January, 2005.

/s/ Robert G. Evans
ROBERT G. EVANS, JUDGE
13th Circuit Court, State of Mississippi

APPROVED AS TO FORM:

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EXHIBIT "A"

IN THE CIRCUIT COURT OF JASPER COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

NATALIE MERRILL	**PLAINTIFF**
VS.	**CAUSE NO. 10-0075**
UNITED AMERICAN INSURANCE COMPANY	**DEFENDANT**
FANNIE L. TRIPLETT	**CROSS-CLAIMANT**
VS.	
UNITED AMERICAN INSURANCE COMPANY	**CROSS-CLAIMANT**

FINDINGS AND ORDER DENYING IN PART AND GRANTING IN PART UNITED AMERICAN INSURANCE COMPANY'S MOTION FOR JUDGMENTS NOTWITHSTANDING THE VERDICTS OR, IN THE ALTERNATIVE, NEW TRIALS OR REMITTITURS

THIS CAUSE came on to be heard on the Defendant United American Insurance Company's motions for judgments notwithstanding the verdicts or, in the alternative, for new trials or remittiturs; and the Court, after having considered the same, being fully advised in the premises, is of the opinion and so finds, as follows, to-wit:

I.

That United American Insurance Company's motions for judgments notwithstanding the verdicts should be, and the same hereby are, denied.

II.

That United American Insurance Company's motions for new trial should be, and the same hereby are, denied.

III.

That United American Insurance Company's motion for remittitur as to compensatory damages awarded Ms. Triplett should be, and the same hereby is, granted.

Ms. Triplett sued United American Insurance Company for attorneys' fees incurred by reason of United American's failure to defend her in Ms. Merrill's suit. By a preponderance of the evidence, Ms. Triplett proved her attorneys fees to be $75,000.00 but offered no proof of other damages. Therefore, remittitur a of $175,000.00 should be entered, reducing her compensatory damages award to $75,000.00.

IV.

That United American Insurance Company's motion for remittitur as to punitive damages awarded Ms. Trilpett should be, and the same hereby is, granted.

With regard to Ms. Triplett's punitive damages, this Court is mindful that the United States Supreme Court has stated, ". . . few awards exceeding a single digit ratio between punitive and compensatory damages . . . will satisfy due process." *State Farm Mutual Automobile Insurance Company v. Campbell, et al.,* 538 U.S. 408 (2003). Since nine times Ms. Triplett's compensatory damages is $675,000.00, a remittitur of $225,000.00 should be

entered, thus reducing her punitive damages award to $675,000.00.

IV.

That United American Insurance Company's motion for remittitur as to compensatory damages awarded Ms. Merrill should be, and the same hereby is, granted. With regard to Ms. Merrill's compensatory damages, this Court compared her damages to those listed in *Stewart v. Gulf Guaranty Insurance Co.*, 846 So.2d 192 (Miss. 2002)) (see page 199). In that case, the Mississippi Supreme Court found that the plaintiff's emotional distress justified a compensatory award of $500,000.00 over and above his $3500.00 contractual damages, *Stewart v. Gulf Guaranty Insurance Co.*, 846 So.2d at page 200. (Of course, *Stewart* did not set a "cap" on such damages, but it was a helpful guide.) From that analysis, it is this Court's opinion that Ms. Merrill's evidence justifies an award of $200,000.00; and that the amount awarded in excess thereof is contrary to the overwhelming weight of the evidence. Therefore, a remittitur of $300,000.00 should be awarded, thus reducing Ms. Merrill's compensatory damage award to $200,000.00.

V.

That United American Insurance Company's motion for remittitur as to punitive damages awarded Ms. Merrill should be, and the same hereby is, denied.

As much deference as possible must be given to the jury's verdict; since nine times Ms Merrill's compensatory damages (after the remittitur) exceeds the punitive award set by the jury, the punitive damage award to Ms. Merrill will stand as the jury determined.

VI.

That United American Insurance Company's motion regarding award of attorneys fees' to Ms. Merrill should be, and the same hereby is, denied.

The issue of attorneys' fees, costs, and expenses incurred by Ms. Merrill has been well briefed and well argued by counsel for the parties. The Court, therefore, adopts its earlier findings and ruling awarding attorneys fees; and attorneys fees of $527,474.69 heretofore awarded will remain undisturbed.

That post-judgment interest at the rate of 8% per annum, as determined by previous motions, briefs, and arguments, should be awarded in accordance with the "Judgment" filed and enrolled in this cause on the 14th day of September, 2004.

VIII.

As per Section 11-1-55, *Mississippi Code of 1972, Annotated,* Ms. Merrill and Ms. Triplett each have the option of accepting the remittitur or a new trial on damages only. Their respective counsel should be, and the same hereby are, ordered and directed to file a formal statement with the Court expressing their intentions in this regard, after which the appropriate order shall be enrolled.

SO ORDERED AND ADJUDGED, on this the 10th day of December, 2004.

/s/ Robert G. Evans
ROBERT G. EVANS, JUDGE
THIRTEENTH CIRCUIT
COURT
STATE OF MISSISSIPPI

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November 1, 2007

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 1st day of November, 2007.

Supreme Court Case #2005-CA-00048-SCT
Trial Court Case #10-0075

United American Insurance Company v. Natalie Merrill

Motion for rehearing filed by appellant is denied.

NOTICE TO CHANCERY/CIRCUIT/ COUNTY COURT CLERKS

If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

FILED
SEP 20 2007
OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

IN THE SUPREME COURT OF MISSISSIPPI

Case No. 2005-CA-00048

UNITED AMERICAN INSURANCE COMPANY,
Appellant,

VS.

NATALIE MERRILL, *Appellee*.

UNITED AMERICAN INSURANCE COMPANY'S MOTION FOR REHEARING

ORAL ARGUMENT NOT REQUESTED

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MOTION FOR REHEARING

Pursuant to Mississippi Rule of Appellate Procedure 40, defendant/appellant United American Insurance Company ("United") respectfully moves this Court to rehear and reconsider its decision in this case. That decision, issued September 6, 2007, affirmed a monetary judgment against United and in favor of plaintiff/appellee Natalie Merrill ("Merrill") totaling approximately $1.63 million (plus post-judgment interest).

United respectfully disagrees with a number of the rulings that underlie this Court's decision – concerning, *e.g.*, whether Merrill's cashing of the refund check amounted to a mutual rescission or accord and satisfaction (Slip op. 17-21); whether the trial court erred in denying United the use of certain medical records at trial (Slip op. 21-26); and whether the trial court erred in several evidentiary and instructional rulings (Slip op. 26-35).[8] United has no intention, however, of mounting a broadside, point-by-point attack on this Court's judgment. There is, though, one important "point[] of law" that this Court, through no fault of its own, "overlooked or misapprehended" in rendering its decision. Miss. R. App. P. 40(a). It gives rise to an error of constitutional dimension that cannot go unremedied.

On February 20, 2007 – after both United and Merrill had filed their principal briefs and only shortly before United filed its reply – the United States Supreme Court issued its decision in *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007), hold-

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[8] For the Court's convenience, we have attached a copy of the slip opinion as an appendix to this motion.

ing, as relevant here, that the Fourteenth Amendment's Due Process Clause prohibits a jury from basing a punitive-damages award, even in part, on a desire to punish a defendant for alleged injuries to third parties not before the court. Neither United nor Merrill brought *Williams* to this Court's attention – for their part, United's undersigned counsel were simply unaware of the decision – and it seems clear from its written opinion that this Court did not consider *Williams* in addressing the punitive-damages issues in the case.

As we will explain, the record in this case makes clear that the $900,000 punitive-damages award entered rests, at least in part, on allegations of injuries to non-parties. Accordingly, *Williams* – which states the proper interpretation of the Due Process Clause for this case – requires a remittitur of the punitive award or, alternatively, a retrial of the punitive-damages issues.

* * *

Before jumping into the merits, there is one important procedural point. While it is true, as Merrill has argued, that "United did not contest the amount of punitive damages in its brief" (Merrill's Br. 74), that fact is not dispositive, for two reasons. First, this Court expressly addressed the "amount" issue in its written opinion – both in state-law terms and in federal constitutional terms. *See* Slip op. 40-41 (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003)).[9] This Court's consideration and adjudication of the amount issue is suffi-

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[9] As did the trial court, in its decision denying (in relevant part) United's motion to remit the punitive-damages award. *See* R. 2863-68 (citing *State Farm*).

cient to preserve it for review in the United States Supreme Court. *See* R. Stern, E. Gressman, *et al.*, *Supreme Court Practice* § 3.19, at 185 (8th ed. 2002) ("'There can be no question as to the proper presentation of a federal claim when the highest state court passes on it.' It is enough if the state court 'reached and decided it' 'as though properly raised.'") (quoting *Raley v. Ohio*, 360 U.S. 423, 436-37 (1959), *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974), and *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 299 n.3 (1971)).

Second, and more significantly, the constitutional landscape has fundamentally changed since the bulk of the briefing in this case was completed. At the time United filed its principal brief to this Court, the Supreme Court had not yet "h[e]ld explicitly that a jury may not punish for the harm caused others." *Williams*, 127 S. Ct. at 1065. The Court did, however, expressly "so hold" thereafter, in *Williams*. *Id.*

This, therefore, is precisely the kind of case in which rehearing is appropriate. United is not offering a "mere repetition of the argument already considered by the court." Miss. R. App. P. 40(a). Rather, United is asking this Court to take account of an intervening United States Supreme Court decision announcing a new federal constitutional principle of punitive-damages practice. The point is simply that *Williams* – which post-dates most of the briefing in this case and which this Court apparently did not consider – fundamentally changes matters. *Williams* is the law, and this Court should test the punitive-

damages award in this case against *Williams*' constitutional standard.[10]

I. *Philip Morris USA v. Williams* Clearly Holds That A State May Not Use A Punitive-Damages Award To Punish A Defendant For Injuries To Non-Parties.

In *Williams*, the Supreme Court addressed the question "whether the Constitution's *Due Process Clause* permits a jury to base [a punitive-damages]

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[10] The "newness" of *Williams* brings this case within an exception to the general rule that "[t]he purpose of a petition for rehearing is not to allow counsel to add assignments of error which, for whatever reason, were not included in the appellant's original brief to this court." *MST, Inc. v. Mississippi Chemical Corp.*, 610 So. 2d 299, 304 (Miss. 1992). The "reason" that *Williams* was not "included in [United's] original brief to this court," *id.*, of course, is that it had not yet been decided. *See also Hays Finance Co. v. Bailey*, 56 So. 2d 76, 76 (Miss. 1952) ("exceptional circumstances" justify presentation of new argument on rehearing).

For the same reason, United's failure to make a specific "*Williams* objection" or to request a "*Williams* instruction" in the trial court is not fatal. United objected to the trial court's decisions to give certain of Merrill's and Triplett's punitive-damages instructions, *see, e.g.*, Tr. 957-58, 961, 963-64, 967, 968-69, and to refuse certain of United's punitive-damages instructions as tendered, *see, e.g.*, Tr. 971-72, and, as explained below, objected repeatedly to Merrill's and Triplett's lawyers' efforts to introduce evidence of nonparty injuries into the proceedings, *see infra* at 5-7. In that respect, United did at least as much as – if not more than – Philip Morris itself, whose argument the Supreme Court considered and accepted in *Williams* despite the company's failure to "preserve *any* objection to the charges in fact delivered to the jury, to the evidence introduced at trial, or to opposing counsel's argument." *Williams*, 127 S. Ct. at 1068 (Ginsburg, J., dissenting) (emphasis added).

award in part upon its desire to punish the defendant for harming persons who are not before the court (*e.g.*, victims whom the parties do not represent)." 127 S. Ct. at 1060. The Court held that "such an award would amount to a taking of 'property' from the defendant without due process." *Id.*

Williams arose out of a tort suit brought in Oregon by a smoker's widow against a cigarette manufacturer. In advocating a large punitive award, the plaintiff's lawyer there

> had told the jury to 'think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been. ... In Oregon, how many people do we see outside, driving home ... smoking cigarettes? ... [C]igarettes ... are going to kill ten [of every hundred]. [And] the market share of Marlboros [*i.e.*, Philip Morris] is one-third [*i.e.*, one of every three killed].

127 S. Ct. at 1061 (bracketing in original). The Supreme Court vacated the resulting punitive award, accepting Philip Morris' contention "that Oregon had unconstitutionally permitted it to be punished for harming nonparty victims." *Id.* at 1062. More particularly, the Court held that the Due Process Clause "forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." *Id.* at 1063.

The Court offered three reasons for so holding. First, it said, "a defendant threatened with punish-

ment for injuring a nonparty victim has no opportunity to defend against the charge, by showing" that facts specific to the nonparty victim's circumstances disentitle him to relief – for instance, that he suffered no harm, that any injury he endured was not in fact caused by the defendant's conduct, or that he was partially responsible for his own loss. *Id.* Second, the Court emphasized, allowing punishment for harm to nonparties "would add a near standardless dimension to the punitive damages equation." *Id.* "How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate." *Id.* Finally, the Court observed, there is simply "no authority" in any relevant precedent – from *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), to *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), to *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003) – "supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others." *Williams*, 127 S. Ct. 1063.

The Supreme Court acknowledged that "a plaintiff may show harm to others in order to demonstrate [the] reprehensibility" criterion of the punitive-damages calculus. *Id.* at 1063-64. But, the Court stressed, "a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." *Id.* at 1064. In order to navigate the straits between permissible and impermissible uses of nonparty-injury evidence, the Court held that "the *Due Process Clause* requires States to

provide assurance that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers." *Id.* Specifically, the Court concluded, "where the risk of [jury] misunderstanding is a significant one – because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury – a court, upon request, must protect against that risk." *Id.* at 1065.

II. The Record In This Case Leaves Little Doubt That The $900,000 Punitive-Damages Award Was Based, At Least In Part, On A Desire To Punish United For Injuries To Non-Parties.

Just as in *Williams* where the plaintiff's counsel urged the judge and jury to consider "how many other Jesse Williams[es] in the last 40 years in the State of Oregon there have been," 127 S. Ct. at 1061, the record in this case is replete with instances of Merrill's lawyers exhorting the jury, the trial court, and even this Court to rely on injuries to nonparties in fixing the punitive-damages award. Under *Williams*, the $900,000 award that those exhortations produced is unconstitutionally excessive.

Merrill's lawyers appealed to nonparty injuries from the very outset. Paragraph 11 of the Complaint, for instance, alleges that "United and its agents ... engaged in a scheme to induce the Plaintiff *and others similarly situated* to purchase life insurance policies based upon false or misleading sales presentations ...." R. 10 (emphasis added). The Complaint repeats the "others similarly situated" language – which, while at home in a class action,

serves no purpose in an individual action other than to prejudice the fact-finders and damage-calculators – in Paragraph 12, and then again in Paragraph 26 in the lead-up to the punitive-damages allegation itself. *See* R. 10-11, 16. In the same way, the Complaint adverts to nonparty victims when it accuses United of "mak[ing] arbitrary decisions to deny coverage to rightful *beneficiaries* under its policies of insurance without conducting a reasonable investigation." R. 11 (emphasis added).

During the trial itself, the lawyers for both Merrill and Agent Triplett adduced testimony that United denies 90-95% of claims filed by people in Merrill's situation. Tr. 609-10, 614-16. United's trial counsel objected repeatedly that evidence of "other claims" "couldn't possibly be relevant" to any issue in the case, but those objections were overruled and the evidence was allowed. Tr. 609-10, 612, 614-15. Merrill's and Triplett's attorneys referred to that 90-95% figure – which, by definition, refers to nonparties to the litigation – time and again throughout the trial proceedings. *See, e.g.*, Tr. 139 (opening statement); Tr. 167 (voir dire); Tr. 934 (closing argument).

During his closing argument to the jury, Merrill's lawyer again expressly – and provocatively – appealed to nonparty injuries:

> [W]e told you this was an important case, a big important case, *because this case is not only about Ms. Merrill. It's about insurance consumers throughout this country* and how insurance companies are to treat and live up to the contracts they make with their people. Be-

> cause, you know, as Jesus said, as you do to me, you do to the least of me. And *as this company has done to Ms. Merrill, you know, there's other insured – other insurance consumers out here who would make claims.*

Tr. 932 (emphasis added). United's trial counsel promptly objected to this appeal to nonparty injuries, *see id.* at 932-33, but the trial judge declined do anything other than to instruct Merrill's lawyer to "[b]e careful." *Id.*

The appeals to nonparty injuries persisted during arguments on punitive damages. One of Merrill's lawyers urged the jury to "send a message, not only to United American but to all other insurance companies and all other corporations who are so inclined *to come into our State and take advantage of our citizens, and take advantage of those who are least able to help themselves.*" Tr. 979 (emphasis added). Another of Merrill's attorneys reiterated the point he had made earlier and, indeed, further generalized the class of the injured to include all policyholders: "[T]his is a big and important case. It deals with how *insurance consumers* – how *people* be treated when *they* make claims to their insurance companies after *they* have purchased the policies and paid *their* premiums .... And then when *they* make a claim, it's a whole different type of treatment than when you are giving your money." Tr. 990 (emphasis added). He stressed the point again in concluding his closing: "[I]t is a big and important case to *insurance consumers*. But it's also because this company targets one of our most vulnerable segments of our society, our senior citizens. And not only our

senior citizens, but those that have health problems." Tr. 992-93 (emphasis added).

So too, in their opposition to United's motion for JNOV/new trial/remittitur, Merrill's lawyers pointed, as "evidence supporting the Jury's award of punitive damages," to the allegation that "United denies 95 percent of similar claims" – *i.e.*, claims that, again, may resemble Merrill's in some of their particulars but that, nonetheless, are filed by nonparties to the litigation. R. 2812-13.

Finally – and most pointedly – Merrill's lawyers explicitly defended the $900,000 punitive-damages award in their January 25, 2007, brief to *this Court* by reference to alleged nonparty injuries. Not only did Merrill's lawyers repeatedly refer in their brief to the allegation that United denies up to 95% of claims submitted by other individuals in Merrill's shoes, *see, e.g.*, Merrill's Br. 1, 23, 29, 74, 79, but they also went further and urged (in the "Punitive Damages" portion of their Statement of Facts) that "[t]he evidence demonstrated the impact a punitive damages verdict would have on *punishing United for business in Mississippi*, by showing that Ken Parker, United's General Agent for the State of Mississippi, was number **one** in the sale of life insurance policies **in the nation**." Merrill's Br. 30 (bold and underline in original) (italics added). In the argument section of the brief, the appeal to alleged nonparty injuries was even more patent. Specifically, in contending that "The Amount of Punitive Damages is Reasonable," Merrill's lawyers stressed that "[t]he award is appropriate to *punish United*, which denies up to **95%** of similar claims, *for the impact of its gross misconduct in Mississippi* – where it sells more life insurance policies than any other

State **in the Nation**." Merrill's Br. 74 (bold in original) (italics added).

The repeated appeals to nonparty injuries in this case – and particularly those in this Court, which explicitly advocated "punish[ing]" United for conduct directed to third parties throughout Mississippi – are every bit as stark as the "other Jesse Williams[es]" remark that the Supreme Court found problematic in *Williams*. *See* 127 S. Ct. at 1061. The appeals here – and the punitive award they serve to support – must suffer the same fate.[11]

III. The *Williams* Error In This Case Requires A Remittitur Of The $900,000 Award Or, In The Alternative, A Retrial Of The Punitive-Damages Issue.

In concluding its opinion in *Williams*, the Supreme Court suggested two permissible remedies: Where, as here, there is a risk that nonparty-injury evidence has led to an unconstitutionally excessive verdict, application of the proper standard "may lead to the need for a new trial, or a change in the level of the punitive damages award...." 127 S. Ct. at 1065. The Court left it to individual courts to determine, in the specific circumstances presented, which of the

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[11] The United States Supreme Court has GVR'd – *i.e.*, granted, vacated, and remanded – at least two lower-court decisions in the light of *Williams*. *See Buell-Wilson v. Ford Motor Co.*, 46 Cal. Rptr. 3d 147 (Cal. Ct. App. 2006), *vacated*, 127 S. Ct. 2250 (2007); *Grefer v. Alpha Technical*, 901 So. 2d 117 (La. Ct. App. 2005), *vacated sub. nom. Exxon Mobil Corp. v. Grefer*, 127 S. Ct. 1371 (2007). Absent correction here, this Court's September 6, 2007 decision will presumably be a GVR candidate, as well.

two remedies to employ in reducing excessive punitive awards.

Several considerations specific to this case point to remittitur as the better option. For starters, both the version of Miss. Code Ann. § 11-1-65 in force when this case was commenced and the current iteration of that same statute clearly contemplate that "the same trier of fact" should both decide liability and fix punitive damages. Miss. Code Ann. § 11-1-65(1)(c). It is, however, quite doubtful that the circuit court would be able now, three years after the fact, to empanel the same 12 jurors for a new punitive-damages trial.

Moreover, even assuming that § 11-1-65(1)(c)'s "same trier of fact" requirement could be excused so as to permit a new trial before a new jury on punitive damages only, *cf. Chevron U.S.A., Inc. v. Smith*, 844 So. 2d 1145, 1151-52, 1153 (Miss. 2003) (McRae, P.J., and Easley, J., separately concurring in part and dissenting in part), considerations of judicial economy counsel against that course and in favor of remittitur. The punitive-damages phase of this particular case was remarkably short. The portion of the punitive-damages phase that occurred in the presence of the jury occupies a total of 19 transcript pages – all but two of which is devoted to lawyers' closing arguments. *See* Tr. 948-50, 979-94. The reason for the sparse evidentiary record devoted specifically to punitives is that all three parties – Merrill, Triplett, and United – relied overwhelmingly for their punitive-damages cases on the evidence that had been adduced at the liability phase of the trial; they simply "incorporated" the liability-phase evidence into the punitive-damages phase. *See* Tr. 947-48. (Merrill and Triplett each introduced one new docu-

ment specifically for punitive-damages purposes. *See* Tr. 940, 947. United rested exclusively on its liability-phase evidence. *See* Tr. 947.)

In the specific circumstances of this case, a "new trial" would be awkward and inefficient. Any retrial, of course, would have to be limited to punitive-damages issues. United has not raised in this motion any challenge to the $200,000 compensatory verdict; accordingly, that award would necessarily stand. But because the evidence pertaining to punitive damages is not self-contained – because the parties relied almost entirely on liability-phase evidence to make their punitive-phase arguments – a retrial of the punitive-damages issues could conceivably require a "do over" of almost the entire trial.

There is precedent to support the remittitur solution. One California appellate court, for instance, when faced with a similar error – a trial court's allowance of evidence that bore no relationship to the harm suffered by the plaintiff in the case – decided to remit the punitive-damages verdict to an amount that, in the court's judgment, was "not more than a properly instructed jury likely would award." *Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793, 812 (Cal. Ct. App. 2003). The court offered the plaintiff a choice: accept the remitted award or proceed to a new trial on punitive damages only. *See Romo*, 6 Cal. Rptr. 3d at 813. More recently, in *Williams v. ConAgra Poultry*, 378 F.3d 790, 796-99 (8th Cir. 2004), the Eighth Circuit remitted a punitive award that was deemed excessive, in part, because it was infected by the jury's consideration of extraneous evidence. Quoting the Supreme Court's observation in *State Farm* that "'[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only

equal to compensatory damages, can reach the outmost limit of the due process guarantee,'" the court adopted a multiple of one and remitted the punitive award to $600,000. *Id.* at 799 (quoting *State Farm*, 538 U.S. at 425). Because the compensatory award here – $200,000 – is likewise "substantial,"[12] this Court should, consistent with *ConAgra*, remit the punitive award to $200,000.

There is, in candor, also support for the view that a retrial limited to punitive-damages issues, rather than a remittitur of the award, is the appropriate remedy for a *Williams* error. The Ninth Circuit has recently so held. *See Merrick v. Paul Revere Life Ins. Co.*, __ F.3d __, __, 2007 WL 2458503, at *8 (9th Cir. Aug. 31, 2007); *White v. Ford Motor Co.*, __ F.3d __, __, 2007 WL 2445952, at *7 (9th Cir. Aug. 30, 2007). It is the peculiar circumstances of this case, rather than an *a priori* preference, that leads United to suggest remittitur as the wiser course of action. If, however, this Court decides instead to reduce the $900,000 punitive award here by way of a new trial aimed exclusively at determining a lower punitive-damages figure, United will of course participate in that enterprise – with the understanding, of course, that any resulting award would be capped at $900,000, the amount the jury here awarded even *after* having been invited (impermissibly, as it turns out) to punish United for injuries to nonparties.[13]

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[12] *See, e.g., Thomas v. iStar Financial, Inc.*, __ F.Supp.2d __, __, 2007 WL 2701270, at *8-9 (S.D.N.Y. Sept. 7, 2007) (compensatory award of $190,000 was sufficiently "substantial" to require remittitur of punitive award to 1x).

[13] Courts that have chosen the retrial remedy have been clear in expecting that any resulting award will likely decrease but, in any event, cannot increase relative to the tainted verdict. *See,*

CONCLUSION

It is clear on this record that *Williams* error exists. Whether this Court fixes the problem itself through a remittitur or instead remands for a new trial aimed at reducing the $900,000 award, it should remedy the error.

Respectfully submitted,

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e.g., *White v. Ford Motor Co.*, 312 F.3d 998, 1016 (9th Cir. 2002) (If properly instructed, "[p]ossibly the jury would have chosen *as large* an award had it been told to vindicate only the rights of Nevadans, but possibly it would have chosen a *substantially lower* award." (emphasis added)).

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SUPREME COURT
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IN THE SUPREME COURT OF MISSISSIPPI

Case No. 2005-CA-00048

UNITED AMERICAN INSURANCE COMPANY,
Appellant,

VS.

NATALIE MERRILL, *Appellee*.

UNITED AMERICAN INSURANCE COMPANY'S REPLY TO NATALIE MERRILL'S RESPONSE TO MOTION FOR REHEARING

ORAL ARGUMENT NOT REQUESTED

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REPLY BRIEF IN SUPPORT OF THE MOTION FOR REHEARING

I. Merrill Offers Essentially No Response to United's *Williams* Argument on the Merits.

As the United American Insurance Company's ("United's") Motion for Rehearing explains in detail, the record of this case is chock full of examples of Merrill's lawyers appealing to nonparty injuries. United Mot. 5-8. United's demonstration leaves little doubt that the $900,000 punitive damages award in this case was in fact based, at least in part, on a desire to punish United for injuries to nonparties, which, the United States Supreme Court has since held, violates a defendant's due process rights under the Fourteenth Amendment. *See Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1060 (2007).

Tellingly, in her opposition to United's motion for rehearing, Merrill offers essentially no response on the merits. She has nothing to say about the numerous documented instances in which her lawyers repeatedly injected nonparty evidence into the case. *See generally* Merrill Resp. Instead, she merely states – in conclusory fashion – that "the Record in this case contains no evidence supporting" United's *Williams* argument. Merrill Resp. 6. But as United has shown, Merrill is quite wrong about that. The "Record in this case" is what it is. Merrill's refusal to engage it does not make it go away.

The punitive award here is infected with *Williams* error. This Court should remedy that error.

II. Merrill's Various Efforts To Convince This Court To Ignore The *Williams* Issue Are Unavailing.

Rather than defending the punitive award here against the charge that it is infected with *Williams* error, Merrill offers a laundry list of reasons why this Court should ignore that error. None of those reasons is persuasive.

a. In The Interests Of Federalism And Comity, This Court Should Have The First Opportunity To Correct The *Williams* Error.

Merrill correctly acknowledges (Merrill Resp. 2) that in its opinion this Court expressly addressed the constitutionality of the amount of the punitive damages verdict. *See* Slip op. 40-41. Likewise, Merrill does not deny that this Court's consideration of the amount issue in its opinion suffices to preserve the issue for United States Supreme Court review.[14] Merrill charges, however, that United has raised *Williams* in its motion for rehearing merely as a "back door" attempt to preserve the amount issue for later presentation to the United States Supreme Court. Merrill Resp. 2-3. She is wrong about that.

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[14] *See* United Mot. 2 (quoting R. Stern, E. Gressman, *et al.*, *Supreme Court Practice* § 3.19, at 185 (8th ed. 2002) ("'There can be no question as to the proper presentation of a federal claim when the highest state court passes on it.' It is enough if the state court 'reached and decided it' 'as though properly raised.'") (quoting *Raley v. Ohio*, 360 U.S. 423, 436-37 (1959), *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974), and *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 299 n.3 (1971))).

Again, this Court's initial consideration of the amount issue is quite sufficient for preservation purposes. United raises the *Williams* issue now in the interests of federalism and comity – to allow this Court the first opportunity, *i.e.*, before U.S. Supreme Court review, to correct a constitutional error that had previously been "overlooked." *See* Miss. R. App. P. 40(a).

b. United Raised The *Williams* Issue As Soon As It Learned Of The Decision.

Merrill faults United for failing to raise the *Williams* issue in its opening brief. Merrill Resp. 3. But that failure is easily explained: *Williams* had not yet been decided and thus did not yet *exist*. Seeking a way around the basic epistemological point that knowledge follows existence, Merrill seeks to characterize *Williams* as no big deal – "but another rung in a long established line of United States Supreme Court Opinions, following *BMW*, that address the amount, and constitutionality of punitive damages awards." Merrill Resp. 4-5. And because *Williams* broke no new ground, Merrill argues, United has no excuse for having failed to invoke the bar on nonparty evidence earlier. Merrill's understanding of *Williams* is self-evidently wrong. For one thing, the Supreme Court would never have bothered to grant certiorari in *Williams* if prior decisions made it clear that a jury may not punish a defendant for harm to nonparties.[15] But there is no reason to

---

[15] Indeed, the procedural history of *Williams* itself shows that the bar on nonparty-injury evidence was anything but a foregone conclusion. In *Williams* both sides originally appealed a $32 million punitive damages verdict, which had been reduced

speculate: The Supreme Court plainly stated in *Williams* that it had "not previously h[e]ld explicitly that a jury may not punish for the harm caused others." *Williams*, 127 S. Ct. at 1065. "But," the Court emphasized, "we do so hold now." *Id.* That is a clear statement of recognition that the Court was announcing a new constitutional principle. United, therefore, cannot be faulted for not raising a *Williams* argument in its opening brief.

It is true, of course, that United did, strictly speaking, have an opportunity to raise the *Williams* issue in its reply brief, at oral argument, or in a Rule 28(j) letter. Ideally, United would have done so. But again, there is a simple (and honest) response: Counsel just didn't know about *Williams* until opportunities to raise it had passed. That oversight, while regrettable, should not prevent this Court from righting a constitutional wrong that violates, in a significant way, United's due process rights under the Fourteenth Amendment – and, indeed, a wrong

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by the trial court from $79.5 million. *Williams*, 127 S. Ct. at 1061. The Oregon Court of Appeals restored the original jury award. *Id.* The Oregon Supreme Court then rejected Phillip Morris' appeal. *Id.* When Phillip Morris sought relief from the United States Supreme Court the case was remanded for reconsideration in light of *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). *Williams*, 127 S. Ct. at 1061. The Oregon Court of Appeals maintained its original position. *Id.* On its second appeal to the Oregon Supreme Court, Phillip Morris argued that punishing a defendant for harm to nonparties violated the U.S. Constitution. *Id.* The Oregon Supreme Court rejected this argument. *Id.* The United States Supreme Court granted certiorari to consider this argument rejected by the Oregon Supreme Court, agreed with Phillip Morris, and vacated and remanded to the state courts for further proceedings in light of the new constitutional rule announced by the Court. *Id.*

that Merrill does not even meaningfully dispute. "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planters Nat'l Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

Merrill finally argues that United's objections throughout the trial to statements that appealed to nonparty injuries somehow show that United's counsel foresaw the rule of law announced in *Williams* over two years later – and, therefore, that United should be held responsible for not invoking *Williams* earlier. Again, Merrill is wrong. When, for example, United's counsel objected during closing arguments in August 2004 that statements about other claims ventured outside the evidence presented at trial (*see* Tr. 932-33), he was quite correct that *something* was amiss. But at that time no concrete constitutional claim had yet materialized. It was not until February 2007 that the Supreme Court, in *Williams*, established as a matter of black-letter constitutional doctrine that evidence of harm to a nonparty cannot justify a punitive damages award. *See Williams*, 127 S. Ct. at 1060. And again, as soon as counsel became aware of that new principle, he raised it with this Court.

CONCLUSION

Merrill's is a classic "form over substance" argument. She does not seriously deny – because she cannot – that the $ 900,000 punitive-damages award in this case is infected with *Williams* error. In the interests of federalism and comity, United asks this Court to step in to correct that error, before the U.S. Supreme Court has to.

Respectfully submitted,

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SUPREME COURT, U.S.

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(2)

No. 07-793

IN THE

Supreme Court of the United States

UNITED AMERICAN INSURANCE COMPANY,
Petitioner,

v.

NATALIE MERRILL,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where no jury instruction was requested on the proper use of "harm to nonparties" for assessing punitive damages, where the Petitioner's other requests for jury instructions on punitive damages were granted, where there was no assignment of error on appeal either relating to "harm to nonparties" or the amount or constitutionality of the punitive damages assessed, where no court below considered and ruled on the issue presented in this Question, and where the issue was improperly presented as a new issue to the court below only on a motion for reconsideration, is it appropriate for this Court to grant, vacate and remand (GVR) this case in light of *Philip Morris USA v. Williams*, 127 S.Ct. 1057 (2007), in order to force the court below to reconsider its result even though the issue now raised by Petitioner was procedurally waived under longstanding Mississippi law?

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondent Natalie Merrill respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Mississippi Supreme Court's decision in this case.

In *Philip Morris USA v. Williams*, 127 S.Ct. 1057 (2007), this Court recognized that it was entirely proper to present evidence and argument that others were harmed by a defendant's egregious misconduct to further the factfinder's reprehensibility analysis in the assessment of punitive damages. This Court stated, however, that direct punishment for such harm to others was prohibited by the Due Process Clause. To avoid confusion over the proper use of such evidence, *Williams* held that "where the risk of . . . misunderstanding is a significant one," then "a court, *upon request*, must protect against that risk." *Id.* at 1065 (emphasis added).

Petitioner United American Insurance Company which made no such request at trial and assigned no error on the issue (or any other issue regarding the amount or constitutionality of punitive damages assessed by the jury) in its appeal, now claims that it only discovered the issue and the *Williams* ruling some seven months after this Court handed it down, Pet. at 21, and only after the Mississippi Supreme Court unanimously upheld the jury's verdict. Despite the procedural bar to its petition, it nonetheless asks this Court to issue a GVR to force reconsideration in light of *Williams* by the Mississippi Supreme Court even though United never properly raised the issue before that court.

This Court should decline Petitioner's invitation to erase Petitioner's waiver of any issue of nonparty-harm issue it now claims exists because longstanding Mississippi procedure provides an adequate and independent ground for final disposition.

STATEMENT OF THE CASE

Petitioner United American Insurance Company (hereinafter "United") sells high-priced insurance policies to the elderly to cover future burial costs. The policies are issued without conducting any real underwriting analysis. The company advertises that its coverage is "immediate" and that a policyholder's "protection can never be cancelled as long as premiums are paid on time." Tran. Vol. 30 at 616 (incorporating Ex. K); 677-82. Even so, the record establishes that United denies up to 95% of claims where the insured dies within the first two years of coverage. Tran. Vol. 30, 609-610, 616; Vol. 31 at 792.

Respondent Natalie Merrill was the beneficiary of a United policy purchased on the life of her husband, Robert, eight months before he died of a heart attack in 1997. An agent for United filled out the application form while interviewing Robert and Natalie. Pet. at 13a. The subsequent coverage dispute centered on the answer to Question 6, which asked whether Robert had been treated for congestive heart failure within the past three years.[1]

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[1] Petitioner misrepresents this question in its Petition by leaving out the question's time restriction, which limits the inquiry on treatments to those within the prior three years. *Compare* Pet. at 6 (attempting to portray *any* history of

Robert truthfully answered that he had not been so treated within the past three years, but had been under a doctor's care for that condition some two decades earlier, in 1978 and 1979. United's agent told him that the company did not care about any treatments older than three years and then marked the answer as "no." Pet. at 13a.

The purchased policy was supposed to pay $5,000 (to cover burial expenses) for which the Merrills paid all premiums due. United denied Natalie's claim in 1997, 278 days after it was filed, without conducting any meaningful investigation. United admitted at trial that the only basis for denying the claim was its conclusion that the Decedent had congestive heart failure within the three years prior to the application (Tran. Vol. 28 at 368-69), even though no records in the claim file contained the words "congestive heart failure." Tran. Vol. 28 at 295-299; 370-371. Ultimately, Decedent's treating physicians confirmed that, in fact, Mr. Merrill did not have and was not treated for congestive heart failure in the three years preceding his insurance application. Ex. G at 61, 72 & 75-76; Ex. I at 58-59. A timely subsequent resubmission of the claim by Natalie resulted in another denial of coverage two years later, in the year 2000. Pet. at 2a.

Natalie, who at age 71 took a job in a casino during the graveyard shift to pay off a loan she used to pay her husband's burial costs in the absence of the insurance payment due from United, brought

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congestive heart disease as disqualifying) and Pet. at 13a, 27a (where the Mississippi Supreme Court notes that the three-year period posed by the questionnaire was the only relevant time period).

suit. During the course of the trial, United engaged in gross discovery misconduct. R., Vol. 6 at 801-02. Trial was continued five separate times, three times over Merrill's strenuous objections. United stipulated that its total defense fees and expenses, through trial, estimated in good faith, were $710,000 to counter Natalie Merrill's claim. Ex. P at 22; Tran. Vol. 32 at 941-45.

On August 6, 2004, more than seven years after Mr. Merrill's death and four years after suit was filed, the jury unanimously assessed $500,000 in compensatory damages (reduced through remititur to $200,000) and $900,000 in punitive damages against United. In addition, $527,474.69 in attorneys' fees, costs and expenses were awarded by the court against United.

On appeal to the Mississippi Supreme Court, United primarily complained about the trial court's refusal to admit certain medical records into evidence. As it concedes in its Petition to this Court and as was acknowledged by the Mississippi Supreme Court, United never contested the amount of punitive damages awarded, Pet. at 2 & 45a, nor did it complain that the jury was improperly instructed on punitive damages. In fact, the trial judge gave the jury three instructions on punitive damages requested by United. R, Vol. 18, 2670-75. On punitive damages, United's only assignment of error to the Mississippi Supreme Court, by its own admission, consisted of asserting that the judge erred in "submitting the punitive-damage issue to the jury." Pet. at 8. The Mississippi Supreme Court held that there was no error in submitting the issue to the jury and, *sua sponte,* further held, in a single paragraph, that the punitive damages were not

unconstitutionally excessive. Pet. at 39a-48a. This Court's decision in *Williams* does not bear on the issues decided by the Mississippi Supreme Court.

This Court decided *Williams* on February 20, 2007. United's reply brief before the Mississippi Supreme Court was filed on March 14, 2007 and even then did not cite or raise any issue under *Williams,* a high-profile decision that received considerable attention in both the popular and legal press, as well as within the Bar and the legal academy.[2] Nor did the nonparty-harm issue come up during oral argument on June 5, 2007. Pet. at 45a. The Mississippi high court's decision in this case was rendered on September 6, 2007. Unsurprisingly, the court did not discuss any "harm to others" issue, as it was never presented to them, not even by notice of supplemental authority.

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[2] *See, e.g.,* Robert Barnes, *Justices Overturn Tobacco Award; $80 Million Penalty Is Called Excessive,* WASH. POST, Feb. 21, 2007, at A1; Joan Biskupic, *Justices Toss $79.5M Award to Smoker's Widow,* USA TODAY, Feb. 21, 2007, at 3A; *Insurers Hail Supreme Court's Curtailing of Punitive Damages,* INSURANCE J. (Feb. 21, 2007), *available at* http://www.insurancejournal.com/news/national/2007/02/21/77076.htm; Robin Kurtis Craig, *2007 Supreme Court News,* 32-SPG ADMIN. & REG. L. NEWS 18 (Spring 2007). Even before the decision, the *Williams* case was well-publicized, including in local newspapers in Biloxi, where the *Merrill* case was tried. *See, e.g.,* David Savage, *Great Taste, Less Filling; The High Court's New Term Is Light On Load, But The Subjects Are Still Spicy,* 92-Oct. A.B.A. J., 12 (2006); Mark Sherman, *How Much is Too Much? High Court Considers $79.5M Award,* BILOXI (MS) SUN HERALD, Nov. 1, 2006, at B10; *Supreme Court to Review Philip Morris Appeal,* BILOXI (MS) SUN HERALD, at B10 (May 31, 2006).

On September 20, 2007, a full seven months after this Court's decision in *Williams* and the jurisdictional deadline for any such motion, United filed a motion for rehearing before the Mississippi Supreme Court, asking for reconsideration in light of *Williams,* asserting that it had been utterly unaware of the decision before that time. After that motion was denied without opinion, as is the usual practice, United filed its petition for certiorari in this Court.

REASONS FOR DENYING THE PETITION

I. PETITIONER FAILED TO RAISE THE ISSUE IT NOW PRESENTS TO THIS COURT IN THE MISSISIPPI COURTS AND WAIVED ANY ERROR

This Court has repeatedly adhered to its declaration that "ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller,* 425 U.S. 231, 234 (1976). *See also Matsushita Elec. Indus. Co. v. Epstein,* 516 U.S. 367, 379 n.5 (1996) (Court "generally do[es] not address arguments that were not the basis for the decision below."); *Duignan v. United States,* 274 U.S. 195, 200 (1927) (same).

While this limitation on issues eligible for review comprises a prudential consideration, rather than a restriction on jurisdiction, this Court has made plain that it will not depart from that general rule absent a showing of "'unusual circumstances.'" *Taylor v. Freeland & Kronz,* 503 U.S. 638, 646 (1992) (citation omitted). *Compare* 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE & PROCEDURE: CIVIL 2D § 2805, at 57-58 ("A principle that strikes very deep is that a new

trial will not be granted on grounds not called to the court's attention during the trial unless the error was so fundamental that gross injustice would result.").

Permitting a party, after both trial and appeal, to "discover" new arguments in order to keep a case alive after it has exhausted appeals in a State's court system undermines the orderly administration of justice, as well as fundamental precepts of fairness. A court properly looks askance at such a request in order to prevent parties from withholding objections to instructions at trial in order to preserve a ground for appeal. In the federal system, Federal Rule of Civil Procedure 51 stands as a bulwark against such misuse of the system. In Mississippi, the same uncompromising approach is found in that State's analogue Rule 51. *See* Miss. R. of Civ. P. 51(b)(3) ("No party may assign as error the granting or the denying of an instruction unless he objects thereto at any time before the instructions are presented to the jury.").

Raising the issue for the first time in a motion for rehearing in the state supreme court, which under its rules will not entertain a new issue at that late stage, *see* discussion *infra* at pp. 15-17, does not constitute presentation and denial by a lower court, as United contends it does.[3] This case presents no warrant to depart from the sound policy of denying

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[3] If United's motion for reconsideration in light of *Williams* *did* constitute presentation and denial, then its application for a GVR should be denied anyway because *Williams* is no longer an "intervening decision," but was fully considered.

certiorari to issues first raised in the petition to this Court.

II. NONE OF PETITIONER'S ARGUMENTS EXCUSE ITS FAILURE TO REQUEST AN INSTRUCTION OR ARGUE ITS NEW ISSUE TO ANY COURT BELOW

No showing of unusual circumstances or gross injustice was made in United's Petition nor could it have been made. United freely admits, as the Mississippi Supreme Court found, that it did not contest the amount of punitive damages awarded below. Pet. at 2; Pet. at 45a. It did not ask for nor was it denied a jury instruction that would have limited any evidence or argument concerning nonparty harm[4] to the assessment of reprehensibility, rather than for direct punishment.

United now makes three arguments to overcome the procedural barrier to its assertion of a new issue before this Court. First, United claims that its generic assertions about the unconstitutionality of punitive damages in its responsive pleading at the outset of the case preserved its new claim. Pet. at 6-7. Second, it asserts that its meritless evidentiary objections were sufficient to now aver an instructional error never presented at trial or appeal and never addressed below. Pet. at 13-14. Finally, it claims that its discovery of the *Williams* decision after the

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[4] Respondent disputes whether any evidence or argument was made that posed a substantial risk of jury confusion on the proper use of "harm to nonparties" evidence. *See* p. 25-26 *infra*.

Mississippi Supreme Court ruled against it (and seven months after this Court issued *Williams*) justifies asking this Court to require the Mississippi Supreme Court to reconsider the issue that was never properly presented to them and never considered before. None of these arguments is meritorious.

A. Generic Constitutional Objections Cannot Preserve an Issue or Justify Its Assertion Now

United claims that it sufficiently preserved a *Williams* issue by raising generic constitutional objections to any award of punitive damages in this case. It states, for example, that its Answer to the lawsuit asserted that "Merrill's claim for punitive damages violated the Mississippi and United States Constitutions." Pet. at 6. That Answer further "contended that '[t]he procedures pursuant to which punitive damages are awarded' 'fail to provide a reasonable limit on the amount of the award against the defendant' and 'fail to provide sufficiently specific standards or guidelines under which the trier of fact is permitted to award such damages,' thereby violating the due process provisions of the Fourteenth Amendment and the Mississippi Constitution." Pet. at 6. In an amended Answer, it further asserted that "[a]ny punitive damage award . . . is subject to the standards and limitations against the imposing of excessive awards under the Due Process Clause," citing *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408 (2003). Pet. at 6-7.

Critically, it did not pursue any of these arguments during the subsequent phases of the litigation.[5]

None of these assertions in the pleadings constitutes an objection that the jury may have misused any evidence concerning harm to nonparties. At most, by its citation of *State Farm* and the Mississippi court's discussion and rejection of any excessiveness issue, United preserved a due process objection to the size of the award against it, which is precisely the issue that this Court chose *not* to address in *Williams*. United, however, has not petitioned this Court with a claim of excessiveness. Instead, its petition is limited to whether the jury directly punished United for harm to nonparties, an issue not encompassed within these boilerplate assertions in the pleadings.

As in most jurisdictions, Mississippi's courts require that objections and assignments of error be advanced with significant specificity. Failure to do so constitutes waiver. Thus, Mississippi's Supreme Court has had occasion to

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[5] United also asserts it objected to certain punitive-damage instructions and to the judge's refusal to give other instructions it tendered, but does not specifically describe these instructional issues in its Petition because none of them posed the issue decided in *Williams* and none of the punitive-damage instructions were assigned as errors before the Mississippi Supreme Court. That court extensively discussed United's few assignments of instructional error solely in relation to the award of compensatory damages, which is not at issue here. These various objections, unrelated to punitive damages, are manifestly insufficient to preserve United's new issue, just as objecting to "liability" would be insufficient to preserve a specific issue within the general subject area of liability.

> reiterate the necessity of counsel making specific objections in order to preserve a question for appellate review. We have said many times that general objections will not suffice. Objections to the admissibility of evidence must specifically state the grounds, otherwise, the objection is waived. General objections to [ ] comments in closing arguments do not preserve the point for review. Errors based on the granting of an instruction will not be considered on appeal unless specific objections stating the grounds are made in the trial court.

Oates v. State, 421 So.2d 1025, 1030 (Miss. 1982) (citations omitted). Federal courts utilize the same standard. *See, e.g., American Fid. & Cas. Co. v. Drexler,* 220 F.2d 930, 934 (5th Cir. 1955) (citation omitted) (it is "the duty of counsel to state the ground of his objection and, in proper instances, the authority which supports his position. Otherwise the point may not be preserved for appeal.").

United failed to make objections at trial sufficient to preserve its Question Presented in its appeal to the Mississippi Supreme Court. Perhaps even more telling, United waived the issue by failing to assign the issue as error on appeal.[6] As this Court

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[6] Failure to follow state procedural rules to preserve allegations of instructional error is an "altogether commonplace type of procedural rule that represents an adequate and independent state law ground" for denial of certiorari. *Smith v. Texas.*, 127 S.Ct. 1686, 1699 (2007) (Alito, J., joined by Roberts, C.J., Scalia and Thomas, JJ, dissenting).

has held, "[n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus v. United States,* 321 U.S. 414, 444 (1944).

The rules of civil procedure governing both the Mississippi and federal courts similarly require that objections to jury instructions, as well as requests for instructions, be made at trial, prior to submission of the case to the jury, in order to provide the trial judge with an opportunity to correct any error. *See* Miss. R. Civ. P. 51 and Fed. R. Civ. P. 51. The requirement is a venerable one. *See Mississippi Pub. Serv. Co. v. Collier,* 183 So. 379, 381 (Miss. 1938). Failure "to object at the trial level constitutes a waiver to raise the issue on appeal." *Clark v. Illinois Cent. R.R. Co.,* 872 So.2d 773, 779 (¶ 13) (Miss. Ct. App. 2004) (citation omitted).

United made no such specific objection at trial and requested no instruction. Instead, it now attempts to assert that a generic constitutional objection to punitive damages generally *at the pleadings stage* is sufficient to raise its new issue now. This Court has never countenanced such an attenuated assertion. Instead, it has recognized that a "generic reference" to the Constitution "is not sufficient to preserve a constitutional claim." *Taylor v. Illinois,* 484 U.S. 400, 406 n.9 (1988). Thus, for example, in an earlier punitive damages case, this Court held that an attack on an allegedly excessive punitive damage award that asserted a violation of the Excessive Fines Clause of the Eighth Amendment, made applicable to the States through

the Fourteenth Amendment, did not preserve an argument that the same operative facts violated the Due Process Clause of the Fourteenth Amendment, despite the Petitioners' argument that the due-process objection was within their "clear intendment." *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 277 (1989).

United's generic constitutional objections to punitive damages generally cannot justify its attempt to raise the issue that was before this Court in *Williams* at this late stage, having failed to present it properly at trial or to the Mississippi Supreme Court, and only and improperly well after they lost their appeal on other issues.

B. United's Other Actions at Trial and on Appeal Did Not Preserve the Issue it Raises in its Petition

In addition to the patently insufficient generic constitutional objections discussed above, United asserts that its objection to the *admission* of evidence and to closing arguments that supposedly involved harm to nonparties preserved its right to ask for a jury instruction that it never actually requested. *See* Pet. at 14-15 ("United's trial counsel objected repeatedly that evidence of 'other claims' 'couldn't possibly be relevant' to any issue in the case" and "promptly objected" to closing argument that supposedly "appealed to nonparty injuries").

The trial court, of course, properly denied United's motion to exclude any evidence of nonparty injury and that ruling was consistent with this Court's subsequent holding in *Williams*. There, this Court declared that "[e]vidence of actual harm to

nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible." 127 S.Ct. at 1064. Thus, on the one issue addressed in *Williams* that United raised at trial, this Court's opinion favors the decisions rendered by the Mississippi courts and provides no basis for breathing new life into this matter at this late stage.

The evidentiary issue, however, is not the issue that United raises before this Court. Instead, its Petition asks this Court to direct the Mississippi Supreme Court to consider whether a jury instruction clarifying the proper uses of such evidence should have been given, even though no such instruction was proffered or requested by United at trial and thus no such request was ever denied.

Nor was the issue presented to and decided by the Mississippi Supreme Court. It is therefore not one of those instances, despite United's contrary assertion, where a "'Federal question was raised in a court below . . . [and] actually considered and decided.'" Pet. at 3, quoting *Orr v. Orr*, 440 U.S. 268, 274-275 (1979) (citations omitted). The Mississippi Supreme Court briefly addressed a substantive due process issue concerning whether the punitive damages were excessive and found they were not. Pet. at 46a. That court was not asked to address the nonparty-harm issue or whether there was any "unreasonable and unnecessary risk of any such confusion occurring" so that some form of clarification was needed. *Williams*, 127 S.Ct. at 1065. The Mississippi Supreme Court also did not address that issue *sua sponte*.

Nor was the trial court asked to address any references to nonparties in closing argument with a clarifying jury instruction. Instead, United made a generalized objection insufficient to preserve any appellate issue, *see Oates*, 421 So.2d at 1030, and which it utterly abandoned on appeal.

Instead, the first time an issue was raised about possible jury confusion and the need for a clarifying instruction was in a motion for rehearing after the Mississippi Supreme Court rendered its decision in this case on September 6, 2007. Denial of the reconsideration motion without opinion cannot be deemed a consideration of the merits of the claim, as United claims, for it is the equivalent of having never raised the issue at all.

As in the federal courts, a motion for reconsideration is not available to raise new issues, absent "extraordinary circumstances." *Leverette v. Louisville Ladder Co.*, 183 F.3d 339, 342 (5th Cir. 1999) (noting as well, "generally speaking, we will not consider an issue raised for the first time in a Motion for Reconsideration."). United's motion for rehearing before the Mississippi Supreme Court was a misuse of the rehearing procedure and thus cannot count as putting the issue in this Petition before that court. The Mississippi Supreme Court has long held that the "purpose of a petition for rehearing is not to allow counsel to add assignments of error which, for whatever reason, were not included in the appellant's original brief to this [C]ourt." *MST, Inc. v. Mississippi Chem. Corp.*, 610 So.2d 299, 304 (Miss. 1992). The rehearing process exists only to correct errors in the opinion written. In explaining this limited purpose, the Mississippi Supreme Court has declared that it "cannot misapprehend or overlook

that which is not presented for our review." *Id.* Mississippi's appellate rules reinforce that limitation; a motion for rehearing must "call attention to specific errors of law or fact which the opinion is thought to contain." Miss. R. of App. P. 40(a). It is not a vehicle for raising new issues. *See also White v. State*, 761 So.2d 221, 225 (¶ 22) (Miss. Ct. App. 2000) ("A rehearing does not encompass a new set of arguments; therefore, it was improper for [petitioner] to raise a new legal or factual argument in his motion for rehearing.").

Mississippi has long followed the common-sense rule that, "[a]s always, an appellant is not entitled to raise new issues on appeal since to do so denies the trial court the opportunity to address the matter." *Touart v. Johnston*, 656 So.2d 318, 321 (Miss. 1995). *See also Educational Placement Servs. v. Wilson*, 487 So.2d 1316, 1320 (Miss. 1986) (calling it a "sound principle that this Court sits to review actions of trial courts and that we should undertake consideration of no matter which has not first been presented to and decided by the trial court."). *Compare Payne v. McNeeley*, 85 So. 197, 197 (Miss. 1920) ("All errors and irregularities therein in the original record, and which might have been corrected by the first appeal, must, on the second appeal, be regarded as settled and adjudicated.").

In a case with timing issues similar to this one, the Mississippi Supreme Court found that a motion for rehearing raised issues not properly preserved and thus ineligible for review. In *Brandau v. State*, 662 So.2d 1051 (Miss. 1995), a criminal defendant lost the appeal of his conviction before the Mississippi Supreme Court but then petitioned for

rehearing on the basis of an intervening decision of that same court, which found a similar indictment to be defective. The court, however, rejected the bid for rehearing because the petitioner "failed to object to the form of the indictments at trial." *Id.* at 1053. That failure was fatal to his request for rehearing. In contrast to the movant for rehearing in *Brandau,* the defendant in the intervening case had "objected to the indictment at trial, on his original brief to this Court and in his response to the State's Petition for Rehearing, whereas [the *Brandau* petitioner] attempts to raise the issue only at the time of filing his Petition for Rehearing." *Id.* at 1054.

United's petition suffers the same fatal defect identified in *Brandau*. It did not raise any pertinent instructional objection at trial, and it did not raise any "harm to nonparties" issue before the Mississippi Supreme Court prior to its petition for rehearing, even though there was ample opportunity. It may not claim that the issue was presented and decided below through its rehearing motion.

C. United's September "Discovery" of this Court's February Decision in *Williams* Cannot Justify a GVR

United's final attempt to justify its request that this Court assume jurisdiction in this matter is based on its ignorance of this Court's ruling in *Williams* until late September, after the Mississippi Supreme Court had already ruled unanimously against its appeal. Pet. at 21 (claiming in its motion for rehearing that it was "simply unaware of the decision"), 26. Being unaware of potentially relevant caselaw cannot excuse United's failure to raise the issue properly in the Mississippi courts for two

fundamental reasons: (1) United still needed to raise the issue at trial and on appeal, and (2) its ignorance of the decision does not constitute excusable neglect.

1. The Subsequent Ruling in *Williams* Does Not Excuse a Failure to Raise the Issue at Trial or Assign Error on Appeal

United asserts that *Williams* changed "the constitutional landscape relevant to the punitive-damages award at issue here fundamentally . . . after the bulk of the state-court briefing in this case was completed" and could not have been anticipated, thus excusing its failure to raise the issue at trial or on appeal. Pet. at 4. Such an assertion is both inaccurate and irrelevant. Other defendants in other cases, such as Philip Morris in *Williams*, anticipated the ruling, made appropriate objections at trial, and requested a jury instruction that attempted to clarify the role of nonparty harms in assessing punitive damages. *See, e.g., Williams*, 127 S.Ct. at 1064; *Merrick v. Paul Revere Life Ins. Co.*, 500 F.3d 1007, 1015 (9th Cir. 2007); and *White v. Ford Motor Co.*, 500 F.3d 963, 972 (9th Cir. 2007).

Prudent counsel would have understood the need to lay a foundation on this issue from previous caselaw. In *State Farm*, this Court put counsel on notice of this issue and squarely held that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of reprehensibility analysis." 538 U.S. at 423. In fact, *Williams* did not overturn a previously existing understanding of the law upon which United could claim it detrimentally relied. *See,*

e.g., Anthony J. Franze & Sheila B. Scheuerman, *Instructing Juries on Punitive Damages: Due Process Revisited After* State Farm, 6 U. PA. J. CONST. L. 423, 427 (2004) (suggesting the need for a harm-to-nonparties instruction in light of *State Farm*).

In *Williams*, this Court also treated the issue as presaged by earlier decisions, stating that it could "find no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others. . . . [Instead,] we have made clear that the potential harm at issue was harm potentially caused *the plaintiff*." 127 S.Ct. at 1063.

Regardless of whether the ruling in *Williams* could have been predicted, an unanticipated turn in the law, by itself, does not justify an application for a GVR, where the issue was never properly raised below. This Court's GVR jurisdiction is limited to those matters "lawfully brought before it for review." 28 U.S.C. § 2106. Interpreting the scope of that authority, this Court has recognized a GVR is warranted only when "intervening developments, or recent developments that we have reason to believe the court below did not fully consider, *reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration.*" *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (emphasis added).

Obviously, where the issue was never properly presented to or decided by the lower court, the decision cannot rest on a premise that the court would now reject. Thus, on the Question Presented by United's Petition, which is of no moment to

anyone other than to United and that was never properly raised in another court below, the rationale behind this Court's GVR jurisdiction simply does not apply.

Instead, for all the reasons discussed *supra*, GVR authority does not extend to "arguments that were not the basis for the decision below." *Epstein*, 516 U.S. at 379. Limiting the ability of disappointed litigants to seek this Court's intervention is consistent with the prudential notion that this Court exercises its GVR authority "sparingly" with an eye to according proper "[r]espect for lower courts [and] the public interest in finality of judgments." *Lawrence*, 516 U.S. at 173-74. GVR jurisdiction does not offer an opportunity to create new issues for appeal that were not timely raised below. When a GVR is issued in light of an intervening decision, it is uniformly because the new decision "cast doubt on the judgment rendered by a lower federal court or a state court concerning a *federal* question." *Stutson v. United States*, 516 U.S. 163, 180 (1996) (Mem) (Scalia, J., dissenting). Here, no pertinent federal question had been presented or decided by the Mississippi Supreme Court.

United's singular example of a case where a GVR was granted in light of a decade-old U.S. Supreme Court decision, *Youngblood v. West Virginia*, 126 S.Ct. 2188 (2006), does not help its cause. Pet. at 20. Unlike here, the Petitioner in *Youngblood* "clearly presented a federal constitutional Brady claim to the State Supreme Court, as he had to the trial court" and the "dissenting justices discerned the significance of the issue raised," and thus addressed it. *Id.* at 2190.

Similar presentation and analysis did not occur in this case before the Mississippi Supreme Court.

This case is also unlike *Lords Landing Vill. Condo. Council v. Continental Ins. Co.*, 520 U.S. 893 (1997), which was also invoked by United. Pet. at 22-23. In *Lords Landing*, this Court issued a GVR because the Fourth Circuit had interpreted a key phrase in a Maryland law to reach a particular result. Eleven days before the Fourth Circuit reached its decision, and unknown to any of the parties in the case, the Maryland Court of Appeals issued an authoritative interpretation of the same phrase in the same statute – one that suggested a different result. This Court found it necessary to issue the GVR to conform the federal judgment *applying state law* to the authoritative construction of that law by that State's highest court. *Id.* at 896-97. Thus, the *Lords Landing* decision does not "resemble[]" this case, as United contends. Pet. at 22. Instead, it follows the standard requirement that the issue must be presented and decided below before this Court will assume jurisdiction and utilize its GVR authority.

Nor can United's failure to raise any issue concerning harm to nonparties properly below constitute a form of excusable neglect. Mississippi has adopted the same standard for excusable neglect as is followed in the Fifth Circuit. Under that standard, "simple inadvertence or mistake of counsel or ignorance of the rules usually does not suffice" to show excusable neglect. *Watters v. Stripling*, 675 So.2d 1242, 1243 (Miss. 1996), quoting *Peters v. United States*, 9 F.3d 344, 345 (5th Cir. 1993) (citation omitted).

Ignorance of the law – or of this Court's precedents – does not provide a basis for a claim of excusable neglect. Under Mississippi's cognate provision to Rule 60, it has said that "neither ignorance nor carelessness on the part of an attorney will provide grounds for relief." *Kirk v. Pope*, --- So.2d ----, 2007 WL 4260123 at *11 (Miss. Dec. 6, 2007) (quotations and citations omitted). Simply put, "ignorance of the rules, or ignorance of the law" cannot justify reconsideration. *Id. See also Webb v. James*, 147 F.3d 617, 622 (7th Cir. 1998) (involving failure to conduct research and unfamiliarity with a relevant decision of this Court).

United's recent discovery of this Court's decision in *Williams* provides no basis for further review of this judgment given United's failure to raise any pertinent issue at trial, its failure to raise the issue in its appeal to the Mississippi Supreme Court, and its asserted justification of "simply" being unaware of the decision. United has presented no extraordinary circumstance excusing its neglect.

III. The Equities Involved in this Matter Do Not Favor a GVR Here

The final refuge invoked by United seeks to revive this case rests on the claim that the equities of the case favor the grant of a GVR here. Pet. at 25-29. In so arguing, it ignores all that came before its Petition in this matter in order to reach the answer it wants. As United acknowledges, a GVR may be refused where the requesting party engaged in "unfair or manipulative litigation" tactics or caused undue and unfair delay, Pet. at 25-26, relying on *Lawrence*, 516 U.S. at 167.

United claims it did not engage in such tactics with respect to the issue raised in its Petition because the "simple (and honest) response [is] Counsel just didn't know about *Williams* until after opportunities to raise it had passed." Pet. at 26. Respondent has no way of judging the truth of this claim and has no reason to doubt its accuracy, but believes that United's repeated instances of litigation misconduct throughout the course of this matter, including withholding discoverable materials (R., Vol. 6 at 801-02; Tran., Supp. Vol. 1, 34-36), suggest that the equities of the case strongly favor permitting this matter, which has dragged on for seven years in litigation, to reach an end. In fact, the relevant time period is actually more than a decade, considering that Natalie's claim was filed in 1997 and, according to United's sales representations, should have been paid within 30 days. Tran. Vol. 27 at 281-83; Vol. 30 at 681; and Ex. CC-4).

United failed to conduct timely discovery and engaged in gross discovery misconduct. R., Vol. 6 at 801-02. It repeatedly engaged in dilatory tactics. It removed the action to federal court, even though the parties did not satisfy the requirement of complete diversity, further delaying trial of the case in state court. It repeatedly told the trial court that it did not need to conduct discovery, only to change its mind on the eve of each new trial date. Trial was continued five separate times, often over Merrill's objections. This misconduct makes United a particularly poor candidate to receive the benefit of an exercise of this Court's discretion.

Moreover, the perpetrator of that misconduct, which engaged significant resources to defend this lawsuit, should not be the beneficiary of any

balancing of the equities. Doing so would encourage the use of such tactics "to stall private litigants in the knowledge that justice delayed will be justice denied." *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 627 (1983). The only just reward for United's strategy of delay and denial is a denial of their Petition and an end of this litigation.

IV. United's Failure to Request a Jury Instruction on Harm to Nonparties is Fatal to their Argument on the Merits

Even assuming *arguendo* that United properly preserved an issue relating to the proper use of evidence or argument that posed an "unreasonable and unnecessary" risk that the jury punished it for harm United visited upon nonparties, United cannot claim that the trial was conducted at a variance from what this Court determined was required in *Williams*. *Williams* establishes that a distinction must be maintained between considering harm to others for reprehensibility purposes and using that harm as a basis for direct punishment by multiplying the compensatory damages by a number representing harmed nonparties.

In establishing that distinction, this Court resolved a question left open as decision in *BMW of No. Amer., Inc. v. Gore*, 517 U.S. 559 (1996). That open question was whether it was proper to multiply a compensatory damage award by the number of similarly affected in-state consumers. 127 S.Ct. at 1063. It found that such a calculation was improper. Thus, the practical import of the Court's ruling in *Williams* is a jury may not multiply the compensatory damage award of a single plaintiff by the number of presumed in-state victims, as a

footnote in *BMW* appeared to authorize. At the same time, *Williams* endorsed a jury's consideration of the fact that the plaintiff "and his misfortune were merely exemplars of the harm that [the defendant] was prepared to inflict on the [relevant] public at large." *Williams,* 127 S.Ct. at 1064 (citation omitted). The record citations proffered by United, never assigned as error in its appeal to the Mississippi Supreme Court, do no more than that – hold Merrill out as an exemplar of the harm United was prepared to inflict.

No evidence was adduced to show how many claims United denied, even when a United employee provided testimony suggesting that up to 95% of claims filed within two years of purchase of the policy were denied. Thus, there is no danger that the compensatory damages found appropriate here directly punished for harm to others.

The assessment of $900,000 in punitive damages found appropriate by the jury – *and by each and every reviewing judge from the trial court to the state supreme court* – amounted to less than two times the compensatory damages awarded by the jury. Pet. at 8a. It is difficult to imagine how that small ratio can represent improper multiplication on the basis of harm to nonparties.

Nor did counsel's closing statement deviate from what is permissible. Punitive damages serve two essential purposes: punishment and deterrence. *See BMW,* 517 U.S. at 568. In *Williams,* this Court reaffirmed that "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *Williams,* 127 S.Ct. at 1062, quoting

BMW, 517 U.S. at 568. Mississippi law permits punitive damages in insurance bad-faith cases "to punish the insurer" who wrongfully denied the claim without an arguable basis and "to deter it from engaging in similar actions in the future," as well as to "serve as a deterrent for others." Pet. at 45a, quoting *Andrew Jackson Life Ins. Co. v. Williams,* 566 So. 2d 1172, 1190 (Miss. 1990). It also recognizes that the plaintiff in such a case serves as a kind of private attorney general and performs a "public service in holding the insurer accountable." *Id.*, quoting *Williams,* 566 So. 2d at 1190. Closing argument in this case did little more than track established law, albeit more colorfully.

Critically, three punitive damage instructions requested by United were given by the trial judge. Those instructions told the jury that any punitive damages awarded must be "reasonably related to the actual damages sustained by Plaintiff Natalie Merrill," are not awarded to compensate any injury, and "should be based on the wrong done rather than on the status of the defendant." R. Vol. 18 at 2670, 2672, 2675. The court, also at United's request, advised the jury of the aggravating factors used in reprehensibility analysis as articulated by this Court in *State Farm*. R. Vol. 18 at 2675, utilizing *State Farm,* 538 U.S. at 419.

Yet, despite being sufficiently aware of the issue to object to Merrill's "send-a-message" closing argument on grounds it now claims implied that Merrill was seeking to punish for harm to

nonparties,[7] United failed to request an instruction that would have clarified any potential confusion not already addressed in the other instructions given. In *Williams,* this Court made it clear that a trial judge must instruct the jury on the appropriate use of harm to nonparty evidence *only* when there is a significant danger that the jury would be confused about its legitimate use *and* in response to a proper request from the defendant. *Williams,* 127 S.Ct. at 1065. In the instant case, there was no request at all. This Court has acknowledged that the trial judge has no obligation to act in counsel's stead:

> A trial judge is a decision-maker, not an advocate. To force him out of his proper role by requiring him to coax out the arguments and imaginatively reframe the requested remedies for the counsel before him is to place upon him more responsibility than a trial judge can be expected to discharge.

Henry v. Mississippi, 379 U.S. 443, 463 (1965).

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[7] Respondent submits that United's argument that asking a jury to send a message amounts to a plea to punish for harm to others is an indefensible contention that goes well beyond being a "stretch."

Because United failed to ask for a clarifying instruction it only now thinks should have been given, a necessary prerequisite to coming within the *Williams* decision, *Williams* cannot provide any relief to United, even if its current complaints were not otherwise procedurally barred.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

January 14, 2008

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No. 07-793

In the
Supreme Court of the United States

UNITED AMERICAN INSURANCE COMPANY,
Petitioner,

v.

Natalie MERRILL,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

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January 22, 2008

QUESTION PRESENTED

This case presents the same issue that this Court addressed in *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007): "[W]hether the Constitution's Due Process Clause permits a jury to base [a punitive-damages] award in part upon its desire to *punish* the defendant for harming persons who are not before the court (*e.g.*, victims whom the parties do not represent)." *Id.* at 1060 (emphasis in original).

The specific question presented here is whether this Court should GVR for further consideration in light of *Williams*.

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ARGUMENT

Merrill's brief in opposition disputes very little of what is said in United's petition for certiorari. It makes no meaningful effort to deny that, on the facts, the punitive-damages award here was tainted by impermissible appeals to nonparty injuries. Nor does it offer any sustained argument why, under this Court's precedents, a GVR would be inappropriate here. Instead, it stakes its case for denial on a single procedural objection—that United waived in state court any argument that the punitive award here violates the principles this Court enunciated in *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007). That objection is unavailing.

The brief in opposition asks this Court to venture a guess about how the Mississippi courts—which, to be clear, have never decided the waiver issue—would apply state law in the unique circumstances presented here. But the brief's waiver argument is *not* an objection to a GVR; it is an objection to the Mississippi courts ultimately giving United relief from the judgment. That is another conversation for another day in another court. There is no use in this Court conducting an in-depth analysis of what, given the particulars here, could be a tricky question of Mississippi law. This Court should instead do what it has done before in materially identical circumstances: GVR in light of *Williams* and allow the Mississippi courts to decide for themselves whether, under Mississippi law, United abandoned the *Williams* issue in state court.

I. The Brief in Opposition Makes No Meaningful Effort To Defend the Constitutionality of the State-Court Proceedings That Produced the Punitive Award Here.

In the petition, United demonstrated, at length and in detail, that the state-court proceedings here were infected with *Williams* error from the very outset and, indeed, that the infection permeated every phase of the case. Pet. 12–17. There is no point in going over the same ground here, because the brief in opposition makes almost no effort to rebut United's factual demonstration. Two examples should suffice to underscore the seriousness of the problem.

First, at trial, Merrill's lawyers explicitly premised their request for punitive damages on an appeal to nonparty injuries. In closing argument, one of them expressly situated his appeal to nonparty injuries within a reference to Jesus' teaching about the last judgment:

> [W]e told you this was an important case, a big important case, *because this case is not only about Ms. Merrill. It's about insurance consumers throughout this country* and how insurance companies are to treat and live up to the contracts they make with their people. Because, you know, as Jesus said, as you do to me, you do to the least of me. And *as this company has done to Ms. Merrill, you know, there's other insured—other insurance consumers out here who would make claims.*

RR 932 (emphasis added). *Compare* Matthew 25:40.

Second—not quite so sensational but equally problematic given what this Court said in *Williams* about the use of nonparty-injury evidence specifically to "*punish*," *e.g.*, 127 S. Ct. at 1060, 1065—Merrill's lawyers explicitly asked the Mississippi Supreme Court to affirm the punitive award based on allegations of nonparty injury. In their brief to that court, Merrill's lawyers reiterated that "[t]he evidence demonstrated the impact a punitive damage verdict would have on *punishing United for business in Mississippi*, by showing that Ken Parker, United's General Agent for the State of Mississippi, was number one in the sale of life insurance policies in the nation." Br. of Appellee at 30, *United Am. Ins. Co. v. Merrill*, __ So. 2d __, 2007 WL 2493905 (Miss. Sept. 6, 2007) (emphasis added). Continuing the punishment theme, they argued later in the same document that the punitive award was "appropriate to *punish United*, which denies up to 95% of similar claims, *for the impact of its gross misconduct in Mississippi*—where it sells more life insurance policies than any other State in the Nation." *Id.* at 74 (emphasis added).[1]

As best we can tell, save for a single, studiously ambiguous reference (BIO 25) to "counsel's closing statement"—*i.e.*, the Biblical injunction—the brief in opposition makes no effort to deny that, as a factual matter, Merrill's state-court lawyers repeatedly appealed to nonparty-injury evidence. Instead, the brief in opposition makes a strained legal argument, describing the *Williams* rule as one aimed solely at preventing juries from "multiply[ing] the compensatory damage award of a single plaintiff by the number of presumed in-state vic-

[1] Although we demonstrated the inaccuracy of the 95% figure in the petition (Pet. 14 n.6), the brief in opposition continues to invoke it as if the record unambiguously "establishes" its truth. BIO 2.

tims." BIO 24. Because, the brief argues, "[n]o evidence was adduced to show how many claims United denied," there is "no danger that the compensatory damages found appropriate here directly punished for harm to others." *Id.* at 25. With respect, that is not even remotely what *Williams* says. Instead, in *Williams*, this Court held that (1) while evidence of harm to nonparties may be relevant to the "reprehensibility" guidepost, (2) "a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties," and, therefore, (3) that it is "constitutionally important" for a court to provide some "assurance" that a jury does not drift into forbidden "punish[ment]" territory. 127 S. Ct. at 1064.

For reasons we have explained at length, and that the brief in opposition does nothing to refute, the risk that United was in fact "punish[ed]" here for "harms it is alleged to have visited on nonparties," *id.*, is manifest.

II. The Brief in Opposition Makes No Meaningful Effort To Deny That the *Lawrence v. Chater* GVR Factors Apply Here.

The petition demonstrated in detail how each of the criteria articulated in *Lawrence v. Chater*, 516 U.S. 163 (1996), supports a GVR here. Pet. 17–29. The brief in opposition has essentially nothing to say in response.

First, it does not deny that there is "reason to believe the court below did not fully consider" this Court's recent *Williams* decision. *Lawrence*, 516 U.S. at 167. *See* Pet. 18–23. Indeed, the brief in opposition freely admits that the Mississippi Supreme Court never addressed the *Williams* issue. BIO 5, 14. *Second*, save for

an extended foray into Mississippi state waiver law (which we address in detail below, *see infra* Part III), the brief in opposition offers no meaningful response to United's demonstration (Pet. 12–17, 24) that there is a "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence*, 516 U.S. at 167. And with good reason. Given a record so saturated with appeals to nonparty injuries, there is, at the very least, "'reason to question the correctness of the [Mississippi Supreme Court's] decision.'" Pet. 24 (quoting *Lords Landing Village Condo. Council of Unit Owners v. Continental Ins. Co.*, 520 U.S. 893, 896 (1997)).

Third, the brief in opposition offers no rejoinder at all to United's demonstration (Pet. 25) that consideration of the *Williams* issue "may determine the ultimate outcome of the litigation." *Lawrence*, 516 U.S. at 167. *Finally*, there is no dispute that the policies underlying this Court's GVR practice favor that disposition here. The brief in opposition makes no effort to deny that a GVR here would (1) assist the Mississippi Supreme Court by "flagging" the *Williams* issue, which it clearly did not consider; (2) conserve this Court's "scarce resources"; (3) aid this Court by "procuring the benefit of the [Mississippi Supreme Court's] insight" on the *Williams* question; and, most importantly, (4) avoid the "'[p]otential for unequal treatment' that is inherent in [this Court's] inability to grant plenary review of all pending cases raising similar issues." Pet. 27–28 (quoting *Lawrence*, 516 U.S. at 167).

The only "merits" argument, so to speak, that the brief in opposition offers against a GVR pertains to the "equities." The brief grudgingly concedes that there is

"no reason to doubt" (BIO 23) the truth or accuracy of the "simple (and honest)" explanation that United's state-court lawyers "were simply unaware of the recent *Williams* decision until after [the Mississippi Supreme Court] rendered judgment"—and, therefore, that "[t]here could be no suggestion that [they] were attempting to 'manipulat[e]' the system by raising *Williams* when they did," namely, on rehearing in that court. Pet. 26 (quoting *Lawrence*, 516 U.S. at 168). The brief in opposition nonetheless attempts to derail United's GVR request with allegations of "gross discovery misconduct" and "dilatory tactics" in the conduct of the trial. BIO 23. There is no point in a detailed response to those allegations because, however dramatic they may seem, they are legally irrelevant. The question in determining the propriety of a GVR is whether the circumstances surrounding the intervening or recent development *itself* are "part of an unfair or manipulative litigation strategy." *Lawrence*, 516 U.S. at 168. For reasons we have explained at length—and that the brief in opposition makes no effort to deny—the answer here is an emphatic no. Pet. 25-26.[2]

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[2] The brief in opposition's other shots likewise miss the mark. Footnote one, for instance, accuses United of having "misrepresent[ed]" the substance of a question on the insurance form (concerning treatment for congestive heart failure) that underlies this case – specifically, by "leaving out the question's time restriction, which limits the inquiry on treatments to those within the prior three years." BIO 2 n.1. There was no misrepresentation. Not only does the petition *expressly* refer to the three-year limitation (Pet. 5), but also, and more fundamentally, the three-year time limit (like almost all of the underlying facts here) is irrelevant. All that could possibly matter is that United denied the claim on the basis of its determination that Robert Merrill had indeed undergone treatment for congestive heart failure during the pertinent period. Pet. 6. And Merrill's brief in opposition expressly admits that much. BIO 3.

III. The Brief in Opposition's Invocation of Mississippi State Waiver Law Is No Basis for Refusing To GVR.

Rather than *either* defending the constitutionality of the punitive-damages award that resulted from the state-court proceedings *or* tackling the GVR question head on, the bulk of the brief in opposition is devoted to various assertions that United waived its *Williams* argument—under Mississippi law—by failing to raise it earlier than it did in state court. BIO i, 1–2, 6–8, 10–12, 15–17, 19–22, 24, 27. The reason the brief in opposition swings so hard is that it fundamentally misunderstands the nature of the relief that United seeks from this Court. Merrill's brief objects to what it perceives as United's request for a GVR in light of *Williams* "in order to *force the court below to reconsider its result* even though" (Merrill claims) "the issue now raised by [United] was procedurally waived under longstanding Mississippi law." BIO i (emphasis added). Merrill's brief makes the same claim repeatedly. *See id.* at 1 ("[United] asks this Court to issue a GVR to force reconsideration in light of *Williams* by the Mississippi Supreme Court even though United never properly raised the issue before that court.").

The brief in opposition tilts at windmills of its own making. United does not ask this Court to "force" the Mississippi courts to reconsider the award here in light of *Williams* without regard to any waiver that might actually have occurred under state law (or, in the brief in opposition's words, to "erase" any supposed waiver, BIO 2). All United asks is that this Court GVR in light of *Williams* and send the case back to the Mississippi Supreme Court. At that point, the Mississippi Supreme

Court—which, again, has never addressed the waiver argument that Merrill makes here—can authoritatively determine for itself whether, in the unique procedural circumstances presented, United waived its *Williams* argument as a matter of state law.

That is precisely the tack this Court has taken when faced with similar circumstances in the past. Consider *Time Warner Entertainment Co. v. Six Flags Over Georgia LLC*, 534 U.S. 801 (2001), in which this Court GVR'd a state-court decision in light of another watershed punitive-damages decision, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). In that case, the Georgia Court of Appeals had sustained a punitive award against Time Warner's challenge that it violated "Georgia law." *Time Warner Entm't Co. v. Six Flags Over Georgia LLC*, 537 S.E.2d 397, 416 (Ga. Ct. App. 2000). The state court did not consider or adjudicate any federal-law challenge to the award. After the Georgia Supreme Court denied discretionary review, Time Warner filed a petition for certiorari in this Court seeking, in relevant part, a GVR in light of *Cooper Industries*. Pet. for Cert. at 22–24, *Time Warner* (No. 00-1875). As has Merrill here, the respondent there devoted the great majority of its brief in opposition to various contentions that Time Warner had waived any federal-law challenge to the punitive award by failing to raise it properly in the state courts. BIO 1–2, 7–8, 9–24, *Time Warner* (No. 00-1875). Despite the fact that the alleged state-court waiver there was significantly clearer than any that might arguably have occurred here—Time Warner had *expressly requested* the very "abuse of discretion" standard of review that it then sought to challenge as unconstitutional in this Court, *see id.* at i, 8, 11, 16–17, 22–23—this Court GVR'd to the Georgia Court of

Appeals for "further consideration" in light of *Cooper Industries*. *Time Warner*, 534 U.S. at 801. (On remand, the Georgia Court of Appeals determined that any federal due-process objection to the punitive award had indeed been waived as a matter of state law. *Time Warner Entm't Co. v. Six Flags Over Georgia LLC*, 563 S.E.2d 178, 184–85 (Ga. Ct. App. 2002), *cert. denied*, 538 U.S. 977 (2003).)

Rather than follow the sensible course charted in *Time Warner* (and accord United the same treatment the petitioner there received), the brief in opposition asks this Court to deny certiorari based on its own independent resolution of a pure state-law question (*i.e.*, waiver) that the Mississippi state courts themselves have not yet even addressed.[3] The brief in opposition is chock full of citations to Mississippi court decisions and rules and discussions of Mississippi law. *See, e.g.*, BIO 11, 12, 14, 15, 16, 17, 21, 22, 26. The brief's arguments turn principally on what it says "Mississippi's courts require," *id.* at 10, what "the Mississippi Supreme Court has declared," *id.* at 15, what sorts of limitations "Mississippi's appellate rules reinforce," *id.* at 16, and what kinds of standards "Mississippi has adopted," *id.* at 21. With respect, the brief in opposition has addressed those arguments to the wrong tribunal. They are not objections to this Court's exercise of its traditional GVR practice; rather, they are objections to United ultimately obtaining relief *on remand* in the Mississippi courts.

As in *Time Warner*, GVR here makes good practical sense. This Court has long expressed its reluctance to

[3] Given the absence of any state-court determination of waiver, the brief in opposition is wrong to suggest that there exists here any "independent and adequate state ground" bar. BIO 11 n.6.

decide cases based on interpretations of state law. *See, e.g.*, *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 177 (1990). There is no point in departing from that practice here and denying certiorari simply because one party contends that an important constitutional issue *may* not have been properly preserved in state court. The simple and prudent solution, given the likelihood that *Williams* error infected the state-court proceedings, is to GVR to the Mississippi Supreme Court. If that court finds a waiver—because United was either (1) insufficiently clairvoyant in failing to request a specific "*Williams* instruction" at trial or (2) insufficiently diligent in presenting the *Williams* issue on appeal—so be it. *See Time Warner*, 563 S.E.2d at 184–85. If, however, the Mississippi Supreme Court determines that, in the unique circumstances presented here, United did not waive its *Williams* argument, that court may then determine whether *Williams* error exists and, if so, what the appropriate remedy ought to be.

United, of course, believes that there is good reason to think that the issue should *not* be deemed waived as a matter of Mississippi law. In particular, it is not at all clear that United should have been required to anticipate this Court's decision in *Williams* either at trial or when it assigned errors in the Mississippi Supreme Court. At both junctures—and, indeed, even at the time United filed its principal brief in the Mississippi Supreme Court—this Court had not yet "h[e]ld explicitly that a jury may not punish for the harm caused others." *Williams*, 127 S. Ct. at 1065. This Court "so h[e]ld" only thereafter, in *Williams*. *Id.* And whether United should be deemed to have waived the *Williams* issue by not bringing it to the Mississippi Supreme Court's attention in its reply brief or in a supplemental filing is, at the very

least, debatable. The point, in any event, is that the debate is one that must initially be had on state-law terms in a court competent to judge it. This is not the forum for *predetermining* the state-law waiver issue.

CONCLUSION

United's proposal here, which is consistent with standard GVR practice and precedent, seeks to elevate substance over form. The brief in opposition's, by contrast, trades on form and form alone – and worse, on a matter of form that is properly decided by the Mississippi courts.

This Court should grant the writ, vacate the Mississippi Supreme Court's judgment, and remand the case to that court for "further consideration" in light of *Williams*. What result that "further consideration" produces will be, at least in the first instance, up to the Mississippi courts.

Respectfully submitted,

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